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No. 22694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS NATIONAL BANK, a national banking association,

Appellant,

vs.

COMPANIA DE NAVEGACIONE ALMIRANTE, S. A. PANAMA,

Appellee.

OPENING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

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OPENING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

Introductory Statement.

This admiralty action arises from the activities of Kenray, Inc. ("Kenray") which was engaged in the business of exporting scrap metal to the Far East. In November 1964, in order to deliver a cargo of scrap which had been sold to certain consignees in Taiwan (Formosa), Kenray chartered the vessel S.S. Searaven from libelant and appellee Compania De Navegacione Almirante, S. A. Panama.[1] The charter agreement, with which respondent Bank had no connection, pro-

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[1]Appellee was the libelant (plaintiff) below and appellant Beverly Hills National Bank was a respondent-claimant (defendant). For convenience, we will refer to appellee by its trial court designation "libelant" or as "Compania" and to appellant as "respondent" or "Bank".

vided for the payment by Kenray to libelant of charter hire of $96,750.00, to be paid within seven days after delivery of signed bills of lading. Kenray failed to pay any portion of the agreed charter hire.

The purchase price to be paid to Kenray for the scrap steel was arranged by the issuance of foreign letters of credit on behalf of the consignees. After the scrap was loaded on the Searaven, Kenray drew drafts against the letters of credit in favor of respondent Bank. Those drafts were paid and the amount thereof ($535,371.27) was applied upon Kenray's admitted indebtedness to respondent. Thereafter, libelant commenced this action, contending that it had a maritime lien upon the funds received by the Bank and caused a portion thereof to be attached and deposited in court pending this suit. The matter then proceeded to trial, after which the District Judge held that libelant had a lien claim upon the funds to the extent of the unpaid charter hire plus interest, and entered judgment accordingly. This appeal by respondent Bank followed. There is no material factual dispute and the ultimate issue of law is whether Compania has any superior lien or *in rem* claim upon the aforesaid funds received by the Bank.

Jurisdiction.

1. The judgment appealed from was made in an action in admiralty, which action seeks to impose a maritime lien upon funds which prior to the commencement of the suit were in the possession of respondent Bank. To that extent the action is one of which the District Court had original jurisdiction, being a case in admiralty, and the statutory provision believed to sustain the jurisdiction of the District Court is 28 U.S.C.A. §1333(1).

2. This Court has jurisdiction to review the judgment in that it is a final decision of the District Court. The statutory provisions believed to sustain the jurisdiction of this Court are 28 U.S.C.A. §§ 1291, 1294(1).

3. The pleadings showing the existence of the foregoing jurisdictions are the libel and amended libel in admiralty filed by Compania and the answers thereto and claim filed by respondent Bank. In the amended libel it is alleged: That on September 30, 1964, libelant entered into a charter party with Kenray for the S.S. Searaven for a voyage from California to discharging ports in Japan or Formosa [R. 139 (par. Third)][2] that the vessel was delivered to the charterer (Kenray) and libelant has a lien upon cargo for freight due [R. 139 (pars. Fourth, Fifth)]; that respondent Bank collected the proceeds of certain letters of credit in payment both for the cargo of the Searaven and the carriage of cargo against which libelant has a valid maritime lien right [R. 140 (pars. Eighth, Ninth)]; that said proceeds are within the jurisdiction of the District Court, are held by respondent Bank under color of its claim and that respondent will refuse to pay said funds to libelant unless compelled by order of court. [R. 140 (pars. Eighth-Twelfth)]. Respondent Bank admits that it received the proceeds of drafts drawn against certain letters of credit, but denies that such monies are freights, subfreights or proceeds upon which libelant has a lien, denies damage and asserts affirmative defenses including waiver and estoppel [R. 65-69; 161-168].

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[2]The Transcript of Record consists of two volumes, one of which is a Reporter's Transcript. A reference in this brief to the clerk's (file) portion of the Transcript is signalled by the abbreviation "R." followed by the page referred to. A reference to the Reporter's Transcript of the trial is signalled by the abbreviation "Rep. Tr." followed by the page referred to.

4. By its libel and amended libel, libelant sought to impose a maritime lien upon the funds received by the Bank. To the extent that the asserted lien was maritime in nature, there is no issue of jurisdiction. However, at pretrial and trial libelant asserted (over the objection of respondent Bank) that it had an "equitable" or "trust fund" claim upon the funds, and the judgment of the District Court in part is based upon conclusions of law that respondent was a "constructive trustee" and that it would be "inequitable" to deny recovery to libelant. [R. 226-227, Conclusions 8, 8A, 8B]. To the extent that the judgment is based upon such non-maritime considerations an issue is involved on this appeal whether the same are within the admiralty jurisdiction of the District Court. This issue is discussed in Part III, *A, infra.*

Statement of the Case.

1. The Pleadings.

The libel, as originally filed, was a single cause of action and alleged the making of the charter party between libelant and Kenray, the non-payment of the charter hire, the receipt by respondent of the proceeds of the drafts drawn against the foreign letters of credit and asserted a maritime lien against the proceeds to the extent of the unpaid charter hire of $96,750.00. [R. 2-5.] After exceptions were filed and overruled, respondent Bank filed an answer which in substance acknowledged the receipt of the proceeds of the letters of credit but denied that libelant had any lien thereon. [R. 65-69].

Subsequently, by an amended libel filed with leave of court, libelant asserted a second and separate cause of

action to claim a further maritime lien upon the funds received by respondent; that further lien was by way of indemnification for stevedoring charges of $24,699.17 claimed against the Searaven in a separate proceeding. [R. 138-143]. Both claims were specifically alleged to be maritime in nature and were not based upon any allegations of equity or a trust concept. [R. 140, 141-142 (pars. Eighth, Eighteenth, Nineteenth)]. An answer to the amended libel was filed by respondent again denying the existence of any lien rights in libelant [R. 161-168].[3]

Upon the filing of the suit, the District Court, at the request of libelant, issued an order to show cause why the monies received by respondent should not be attached and brought into court pending the determina-

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[3]The judgment of the District Court did not allow the claim for indemnification sought by the second cause of action of the amended libel and limited libelant's recovery to that sought by its first cause of action *i.e.* the unpaid charter hire plus interest. [R. 227-8, 230]. No cross-appeal was filed by libelant from the denial of its claim for indemnification; and that matter would appear to be final and not at issue here. [*Federal Rules of Civil Procedure,* Rule 73(a); *Moore's Federal Practice,* §72.05, Vol. 7, p. 3021 and cases collected; *Fidalgo Island Packing Co. v. Phillips,* 253 F. 2d 621, 622 (9th Cir. 1957); *Power Service Corp. v. Joslin,* 175 F. 2d 698, 704 (9th Cir. 1949); *Fanchon & Marco v. Hagenbeck-Wallace Shows Co.,* 125 F. 2d 101, 103 (9th Cir. 1942)]. The sometime rule in admiralty that an initial appeal opened the entire judgment for review without the necessity of a cross-appeal was ended by the 1966 amendments making the *Federal Rules of Civil Procedure* applicable to admiralty cases. [See: *Moore's Federal Practice,* §73.09 (1-6), Vol. 7, pp. 3171-3172; *International Milling Co. v. Brown S.S. Co.,* 264 F. 2d 803, 804 (2nd Cir. 1959) and *Rules of the United States Court of Appeals For the Ninth Circuit,* Rule 8.] Therefore, we will not address ourselves in this brief to the merits of the claim for indemnification (which involves some additional issues of law) and will limit our attention to the propriety of the imposition of a lien for the unpaid charter hire. We reserve, however, the right to reply if the issue of indemnification for the stevedoring charges is attempted to be raised here by libelant.

tion of the suit [R. 7].[4] After hearing the court confirmed the order to show cause [R. 55-56] and ordered the attachment and deposit of $145,000.00 (or alternatively the posting of a bond in said sum) pending the determination of the suit, such attachment to be without prejudice to the right of any party on the merits of the claims [R. 59-61]. A bond was filed in said amount [R. 62-64], followed by respondent's claim [R. 75-76] and the issues were thereupon joined.[5]

2. The Facts.

The pertinent facts are not in dispute and are reflected either in the findings of the District Court (most of which were stipulated) or in uncontroverted evidence. They may be summarized as follows:

A. Libelant is the owner of the S.S. Searaven [R. 219, Find. 1]. Respondent Bank is a national banking association with its principal place of business in Beverly Hills, California [R. 219, Find. 2].

B. Under a charter party dated September 30, 1964, libelant and Kenray (as charterer) entered into a voy-

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[4]The order to show cause was issued pursuant to former General Admiralty Rule 37, now reflected in *Federal Rules of Civil Procedure, Supplemental Rules For Certain Admiralty And Maritime Claims,* Rule C(3). This procedure is simply the device by which libelant asserts jurisdiction over the *in rem* respondent (*i.e.* the funds received by the Bank) so as to claim its alleged lien, and is without any determination of the merits of the lien claim. [See generally, *Moore's Federal Practice,* Vol. 7A, pp. 279, 606].

[5]In addition to the claim of lien asserted by libelant against the funds received by respondent Bank, which is entirely *in rem* in nature, libelant also asserted an *in personam* contractual claim against Kenray based upon its charter agreement. Kenray's default was entered upon stipulation [R. 170] and the judgment below included an *in personam* judgment against Kenray. That portion of the judgment against Kenray is not at issue on this appeal.

age charter party relating to the vessel Searaven, providing for a voyage from California to one or two discharging ports in Japan or Formosa. [R. 219, Find. 4; Ex. 1].[6] The charter agreement provided for the payment by Kenray to libelant of charter-hire of $96,-750.00, to be paid within seven days after delivery of signed bills of lading, all of which is unpaid [R. 224, Find. 17; Ex. 1].

C. Respondent Bank did not participate in the charter of said vessel nor did it enter into any contracts or agreements with libelant [R. 219, Find. 5].

D. In November 1964, the Searaven was loaded with scrap steel; the loading took place partly in San Francisco and partly in Los Angeles. [R. 221, Find. 9; Exs. 2, 3]. The cargo, approximately 10,000 tons in all, was steel which had been sold to certain consignees in Taiwan. [R. 220-221, Find. 8; Exs. 2, 3.] Kenray was the seller-shipper of all of the steel loaded except for 999.86 tons of scrap sold by Purdy International Corporation ("Purdy"), not a party to the suit. [R. 221, Find. 10]. Purdy paid to Kenray the sum of $9,998.60 for allowing its steel to be carried on the Searaven. That sum was deposited by Kenray into its commercial checking account with respondent Bank and subsequently set-off and applied on account of Kenray's indebtedness to the Bank [R. 223, Find. 15]. The steel exported by Kenray was procured by Kenray from domestic suppliers using borrowings made from respondent Bank; part of Kenray's debt to the Bank was secured by a security interest in steel stockpiled prior to exportation. [R. 219-221, Finds. 6, 7, 8].

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[6]Some of the provisions of the charter party have particular significance to the dispute here. Those provisions will be discussed in the substantive sections of this brief.

E. The purchase price to be paid to Kenray for the steel sold and shipped by it was arranged by foreign letters of credit issued by Bank of Taiwan and Bank of Canton, Ltd. at the request of the consignees in favor of Kenray, to be drawn against upon presentation of freight prepaid bills of lading and other documents. [R. 220-221, Find. 8; Exs. 4A-4I]. Upon the loading of the steel cargo, bills of lading were issued by libelant's duly authorized agent (the vessel's captain) and delivered to Kenray; these bills of lading all showed freight to have been *prepaid* and constituted contracts of carriage. [R. 221-222, Finds. 9, 11A; Exs. 2, 3]. None of the bills of lading was dated later than November 17, 1964 [*ibid.*]. The purchase price agreed to be paid by the consignees did not contain any allocation for freight [Rep. Tr. 47; Exs. 4A-4I].

F. After libelant's issuance of the freight prepaid bills of lading, between November 11 and November 18, 1964, Kenray drew drafts against the foreign letters of credit in the aggregate sum of $535,371.21 to obtain payment for that portion of the cargo sold by Kenray. Those drafts were all drawn in favor and to the order of respondent Bank. The drafts, accompanied by the bills of lading and other shipping documents, were presented to the foreign banks which had issued the letters of credit; the drafts were all *paid* between November 17 and November 29, 1964, and the Bank received the total payment thereof, $535,371.21. [R. 222-223, Find. 12; R. 176, Pretrial Order, P. 4, Par. 11]. At the time the drafts were delivered and payment made, Kenray was indebted to the Bank in the principal sum of $742,203.81. The funds paid on the drafts were applied on account of that indebtedness, leaving a balance

of in excess of $200,000.00 owed by Kenray to respondent Bank, which remains unpaid. [R. 223, 224, Finds. 13, 16].

G. The Searaven sailed from Los Angeles on November 22, 1964, bound for Taiwan (Formosa). It arrived in Honolulu, Hawaii, on December 31, 1964, where it remained with all of its cargo for a period of seventeen days; during said seventeen day period, some of the cargo was discharged from the vessel for the purpose of making repairs to the vessel and then was reloaded. The vessel then proceeded to Taiwan where it arrived on February 11, 1965; upon arrival in Taiwan libelant did not assert a maritime lien upon the vessel's cargo for unpaid charter hire and permitted said cargo to be discharged and delivered to the consignees without bond from them for unpaid charter hire. Libelant did assert a lien against said cargo for general average (repairs) for which a bond was supplied by the consignees. The discharge of cargo commenced February 18, 1965, and concluded March 20, 1965. [R. 221-222, 224, Finds. 11, 18]. At all times subsequent to loading of the cargo and prior to its discharge, the Searaven and its cargo were under the sole control of libelant and its agents; the Searaven was operated by libelant and all material aspects of the voyage were controlled by libelant; actual control of the vessel was exercised by its Master under direct instructions from libelant. [Rep. Tr. 124-126; R. 175, Pretrial Order Page 3, par. 6].

H. Kenray had chartered vessels prior to the Searaven. In some instances respondent Bank had loaned Kenray monies for the payment of the charter hire of such prior vessels, but in each such instance it had is-

sued its own letter of credit on behalf of Kenray. [Rep. Tr. 50]. No such letter of credit was issued in connection with the Searaven, and the Bank expressly desired not to issue a letter of credit for the Searaven charter hire so as to avoid any liability on the Bank's part. [R. 220, Find. 7; Rep. Tr. 41, 43, 50-51.] Respondent Bank at no time agreed or contracted to pay the freight or charter hire for the subject voyage of the Searaven. [R. 219, Find. 5; R. 175, Pretrial Order, Page 3, par 6]. At no time did any representative of the Bank represent or state that the Bank would pay the Searaven charter hire, [Rep. Tr. 54, 60, 104, 111] or that it would be paid out of the proceeds of the letters of credit. [Rep. Tr. 99, 45]. While there was no statement that the Bank would not pay the freight, an officer of respondent did specifically state to representatives of Kenray that Kenray would have to pay the Searaven charter hire. [R. 223, Find. 14; Rep. Tr. 111.] Kenray was able to procure the Searaven without a letter of credit because of its prior dealings with the brokers representing the owners of the Searaven and the establishment of Kenray's own credit with those brokers. [Rep. Tr. 51, 53].

Specification of Errors.

1. The trial court erred in finding and concluding that the funds received by respondent Bank from negotiation of the letters of credit were proceeds, freights or subfreights upon which Compania had a subsisting maritime lien. [See, Points I and II, *infra*].

2. The trial court erred in finding and concluding that it had jurisdiction to determine purely equitable and non-maritime claims, and in any event, erred in

finding and concluding that respondent Bank held the proceeds of the letters of credit and the monies paid by Purdy to Kenray as a constructive trustee for the benefit of Compania and that it would be inequitable if respondent Bank avoided payment of the charter hire. [See, Point III, *infra*].

3. The trial court erred in finding and concluding that Compania had not waived any lien it may have had, and erred in finding and concluding that Compania was not estopped to assert any lien claim. [See Point IV, *infra*].

4. The trial court erred in finding and concluding that Compania was entitled to judgment against respondent Bank and the *in rem* respondent (i.e. the attached funds) and in any event erred in awarding interest. [See Points I, II, III, IV and V, *infra*].

Summary of the Argument.

It was stipulated and found by the District Judge that respondent Bank had no contractual privity with libelant [R. 219]; accordingly, there could be no direct *in personam* liability on the part of respondent. The claim of libelant here is therefore an *in rem* lien claim against the monies received by respondent and attached. The lien claimed by libelant was based upon legal assertions that said monies represent either (1) proceeds of cargo, (2) subfreights, or (3) a trust fund, upon which libelant has a superior lien for the unpaid charter hire due it from Kenray. The issues of law therefore are:

> A. Do the funds received by the Bank represent proceeds of cargo; and if so, is there any lien thereon for the unpaid charter hire?

B. Did libelant have a lien upon subfreights of the Searaven; and if so, do the funds received by the Bank represent subfreights upon which a lien exists for unpaid charter hire?

C. Is libelant's claim of "trust fund" cognizable in a court of admiralty; and if so, is respondent a constructive trustee for the benefit of libelant?

D. Is libelant, under principles of waiver and estoppel, precluded from asserting any lien here by reason of its issuance of "freight pre-paid" bills of lading and its failure to assert any lien against the cargo of the Searaven?

Respondent Bank believes that under clear and unequivocal authorities, all issues here must be resolved against libelant and the judgment reversed. A summary of the argument may be stated as follows:

1. The owner of the Searaven (libelant) had a possessory lien upon the cargo; that lien was limited to the right to retain possession of the cargo on account of unpaid charter-hire and was lost upon the surrender of the cargo. The owner's lien upon cargo, being possessory in nature, does not extend to the proceeds of cargo. [Point I, *infra.*]

2. The monies paid to respondent Bank and attached were not subfreights; if they were subfreights libelant, by reason of the absence of an appropriate provision in the charter party, had no lien thereon. Furthermore, even if libelant did have a lien upon the monies as subfreights, that lien was lost and discharged

upon payment of the monies to respondent prior to assertion of the lien, and the lien may not be reinstated upon a tracing theory. [Point II, *infra.*]

3. There is no basis for a determination that respondent was a constructive trustee for libelant, in that there was no fraud, illegality, undue influence, mistake or violation of an express trust. The dispute here is between two creditors of Kenray and the fact that one got paid and the other did not, does not create any equitable claim in the latter. In any event, such a claim is not cognizable in an admiralty proceeding. [Point III, *infra.*]

4. Libelant is estopped to assert any lien by reason of its issuance of freight prepaid bills of lading, and by reason of its failure to assert its possessory lien against cargo. [Point IV, *infra.*]

5. In any event, interest was improperly awarded. [Point V, *infra*].

ARGUMENT.

I.

Compania Had a Possessory Lien Upon Cargo for the Unpaid Charter Hire. That Possessory Lien Was Lost Upon Surrender of the Cargo and Does Not Attach to Proceeds.

A. Libelant Shipowner Was Limited to a Possessory Lien on Cargo and Has No Lien on Proceeds of Cargo.

Libelant initially alleges that it has a lien for unpaid charter hire upon the funds attached, asserting that such funds are "proceeds of cargo".[7] Initially, we would concede for the purposes of argument that libelant had a lien upon the *cargo* for the unpaid charter hire (freight).[8] That lien against the cargo was a

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[7]While it is clear from the decisions hereinafter cited that the owner's lien does not extend to proceeds of cargo we would also point out that the assertion that the attached monies (the *in rem* respondent) represent "proceeds" is somewhat specious. At the time this action was commenced and the funds attached, libelant still had possession of the cargo aboard the Searaven. "Proceeds of Cargo", as the term is used in admiralty decisions, refers to what the cargo is converted into *after* the possession of the cargo is surrendered by the owner. [See: *Portland Flouring Mills Co. v. Portland Asiatic S.S. Co.*, 158 Fed. 113, 115 (D.C. Ore. 1907).] *Query*, then, how the funds here attached could be "proceeds of cargo". Nevertheless, for the purpose of this brief we will assume, as libelant alleges, that the attached funds are proceeds of cargo and demonstrate that there nevertheless is no lien thereon.

[8]"Freight", in admiralty terms, does not refer to the goods carried (cargo) but rather to the compensation to be paid to the shipowner. [Gilmore & Black, *The Law of Admiralty* (1957), p. 221]. In this case the freight was the agreed charter-hire to be paid by Kenray to libelant. "Subfreights", as used in the decisions and referred to *infra*, means monies owed to the charterer for the carriage of goods shipped by a third-party shipper. [*In re No. Atlantic, Etc., Co.*, 204 F. Supp. 899, 904 (S.D. N.Y. 1962); Gilmore & Black, *Op. Cit.* p. 208].

possessory lien entitling the shipowner (libelant) to hold the cargo until the freight due libelant was paid.

DuPont, Etc., Co. v. Vance, 60 U.S. 162, 171 (1856);

4885 Bags of Linseed, 66 U.S. 108, 113 (1861);

The Eddy, 72 U.S. 481, 494 (1866);

Gilmore & Black, *The Law of Admiralty* (1957), p. 190, pp. 516-517.

The shipowner's possessory lien is clearly limited to the cargo itself. The sole remedy of the shipowner to recover unpaid freight is to assert his possessory lien against the cargo. The possessory lien is lost by a surrender of the cargo and cannot thereafter be asserted. The possessory lien of a shipowner does not attach to proceeds of cargo.

4885 Bags of Linseed, 66 U.S. 108, 113 (1861).

> ["The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend

upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. (*Rae v Cutler,* 7 How. 729; *DuPont de Nemours & Co v Vance and others,* 19 How. 171.)"

". . . After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument."]

Cranston v. 250 Tons of Coal, 22 Fed. 614, 615 (D.C. N.J. 884).

["Some maritime liens may be enforced . . . by parties who never were in possession; but this is not the nature of the ship-owner's or master's lien upon the cargo for his freight. His right depends upon his detention of the goods until the payment is made. If he parts with them voluntarily and without notice that he looks to them for the freight and charges against them, he loses all right to enforce a lien upon them by a proceeding *in rem.* A different rule is recognized by the courts of continental Europe, but this is the well-established doctrine in admiralty of the Supreme Court of the United States."].

Cutler v. Rae, 48 U.S. 374, 376; 7 How. 729 (1848).

["But it is otherwise in general average. The party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute. The captain has a right to retain them until the general average with which they are charged

has been paid or secured. And as he may do this for the security of the party entitled, he must be regarded as his agent in this respect, and exercising his rights. This right of retainer, therefore, is a qualified lien, to which the party is entitled by the maritime law. *But it depends on the possession of the goods by the master or shipowner, and ceases when they are delivered to the owner or consignee. It does not follow them into their hands, nor adhere to the proceeds.*" (emphasis ours)].

See also:

DuPont, Etc., Co. v. Vance, et al., 60 U.S. 162, 171 (1856);

Wellman v. Morse, 76 Fed. 573 (1st Cir. 1896).[9]

Since the lien of a shipowner (which is the lien asserted in the case at bar) is possessory and limited to the cargo, it does *not* attach to the proceeds of cargo. Libelant's assertions to the contrary are disposed of by the foregoing authorities and the decision in *Portland Flouring Mills v. Portland, Etc., S.S. Co.,* 145 Fed. 687 (D.C. Ore. 1906)[9a] The *Portland* case involved a complicated set of facts which may be summarized as follows: The libelant there was a shipper of cargo of flour which had been transported by means of

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[9]In part I we are conceding, *arguendo*, the existence of a possessory lien upon cargo and demonstrating that it does not follow and adhere to proceeds. However, as we discuss in Part IV, *infra*, even the possessory lien does not exist since it was waived by the issuance by Compania of "freight prepaid" bills of lading.

[9a]There are two decisions relative to this case—the later decision is cited in footnote 7, *supra*.

the charter of a ship owned by the respondent. The freight was to have been paid to respondent by the consignee. After the voyage started the ship ran aground and the cargo was salvaged. The proceeds of the salvage (monies) were paid to the respondent (shipowner). The libelant, however, was compelled to pay the freight for the shipment to the insurance carrier for the respondent since the same could not be collected from the consignees. The libelant then brought the subject action against the shipowner, claiming that since it had paid the freight it was subrogated to the lien claims of the respondent shipowner to the cargo and to the proceeds of cargo, *i.e.*, the salvage money. (145 Fed. at 690-691).

The respondent in *Portland* filed exceptions and the opinion involved the determination of the same. The court noted (p. 691) that since the theory of the libelant was one of subrogation, for the libelant to prevail it must establish a right of subrogation and that the shipowner (to whose rights libelant sought to be subrogated) had a lien on the cargo or the proceeds.[10] Thus, the basic question for decision in *Portland*, as here, was whether the shipowner had a lien on the cargo of flour and whether that lien continued to attach to the proceeds of the cargo.

In *Portland* the court held that the shipowner's lien, being solely possessory, did *not* extend beyond the possession of the cargo and that there could be no attachment of the lien to the proceeds of the cargo. The

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[10]The court noted: "The lien relied upon, through which subrogation is claimed, is the shipowner's lien for freight for the carriage of goods. Such lien depends upon possession, and its preservation upon a continuance of possession." (p. 691).

court made the following statement which is dispositive of libelant's contentions in the case at bar:

> "Such being the nature of the lien that the Portland and Asiatic had upon the flour for the freight charges, and such its right and obligations, it not only waived its lien, as it had a right to do, but it lost it absolutely when it abandoned the cargo to the underwriters, as it thereby surrendered possession, thus depriving itself of an essential in the retention of such lien. *The lien being lost, the alleged fact, which must be taken as true, that the proceeds of the salvaged flour came into the Yokohama Specie Bank to the joint credit of the agents of the Portland and Asiatic and the assurance company, could not be effective to restore it, so that there is no lien upon such proceeds, into whosoever hands they have come.*" (emphasis ours) 145 Fed. at p. 694.

In the case at bar the assertion made by libelant that its lien on cargo attaches to proceeds of cargo is exactly the assertion made and rejected in *Portland*. The possessory lien of libelant is limited to cargo and does not attach to proceeds. This being so, even if the funds paid to respondent Bank are deemed proceeds of cargo, there could be no lien thereon in favor of libelant. [See also: *N. H. Shipping Corp. v. Freights of the S.S. Jackie Hause*, 181 F. Supp. 165 at p. 169 (S.D. N.Y. 1960), where the court states that the shipowner's lien on cargo "depends on possession of the cargo and is lost by unconditional surrender to the consignee."]

The maritime law which grants to the shipowner a possessory lien on cargo is designed to substitute the cargo as security for the payment of the charter hire

in the place of the personal credit of the charterer or any other remedy that the shipowner may have. This point is further emphasized here by the fact that the charter party herein involved (Ex. 1) contains a partial "Cesser Clause."[11] The subject clause involved here reads:

> "Owners shall have a lien on cargo for freight, dead freight, demurrage. Charterer shall remain responsible for dead freight and demurrage (including damages for detention) incurred as part of loading. Charterer shall also remain *responsible for freight and demurrage incurred at port of discharge, but only to such extent as the owners have been unable to obtain payment thereof by exercising the lien on the cargo.*"[12] [Charter Party, Ex. 1, Par. 8 (emphasis ours).]

Thus, by agreement libelant agreed to look first and exclusively to its possessory lien upon cargo for payment of freight due it and released the charterer (Kenray) from all liability for freight, except to the extent that there might be a deficiency resulting from the cargo being insufficient to satisfy the freight claim. This contractual limitation demonstrated libelant's intent to limit its remedies to the exercise of its pos-

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[11]A "Cesser Clause" is one which terminates the personal liability of the charterer for freight once the ship is loaded and substitutes for such personal liability the shipowner's lien upon the cargo. [See Gilmore & Black, *op. cit.*, p. 190; Robinson, *Admiralty Law* (1939) pp. 637-641.]

[12]It is to be noted that this lien clause refers only to the owner (libelant) having a lien on "cargo" and makes no reference to any lien on subfreights. The absence of any provision granting a lien on subfreights is important, the significance of which is discussed in Part II, *B, infra*, dealing with the libelant's assertion that it has a lien on the attached monies as "subfreights".

sessory lien on cargo. Libelant here admittedly had ample opportunity to exercise that lien on cargo but voluntarily chose not to do so. Having failed to do so, and having no personal claim against the charterer (Kenray), it would be the height of inconsistency to permit libelant to reach funds attached in the possession of respondent Bank.

> [Cf. *Todd Shipyards Corp. v. City of Athens*, 83 F. Supp. 67, 81-82 (D.C. Md. 1949) Aff'd on other grounds *sub nom. Acker v. City of Athens*, 177 F. 2d 961 (4th Cir. 1949) where court held lien of shipyard subordinate to liens of voyage where ship permitted to leave shipyard without seizure - court noting that shipyard had voluntarily released a favored position.]

It is, of course, clear that regardless of the presence or absence of a "cesser clause" the shipowner's *lien* (as distinguished from its *in personam* claim against Kenray) is limited to the right to retain possession of the cargo and is lost upon surrender of the cargo. The existence of a cesser clause, however, demonstrates a contractual intent to limit libelant's remedies in the event of nonpayment of charter-hire to that possessory lien.

In the case at bar the District Judge concluded that the surrender by Compania of the Searaven's cargo to the consignees did not discharge its lien in that prior to the surrender Compania had commenced this suit and attached the monies in the hands of the Bank.[13] To reach that conclusion the District Judge relied upon the decision in *N. H. Shipping Corp. v.*

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[13] [R. 226, Concl. 4; R. 196-197, Opinion pp. 1-6].

Freights of the S.S. Jackie Hause, supra, 181 F. Supp. 165 (S.D. N.Y. 1960). We respectfully submit that such reliance is misplaced and is not a correct interpretation of the *Jackie Hause* decision. In *Jackie Hause,* prior to the delivery of the cargo to the consignee the shipowner asserted a claim for unpaid charter hire; unlike the case at bar, however, the consignee had not yet paid the charterer or its assigns and the consignee still retained the freight monies which it had agreed to pay upon delivery. When the claims of the shipowners were asserted, by express contractual agreement, the monies due from the consignee were deposited in an escrow and the cargo released to the consignee. It was thereafter argued that the release of the cargo discharged the shipowner's lien. The court, in *Jackie Hause,* rejected that argument, but not for the reasons assumed by the District Judge here; the court in *Jackie Hause* recognized the general principle that a shipowner's lien is dependent upon possession, but found that the freight monies were substituted for the cargo by the consignees upon an express agreement and therefore there was no unconditional release of the cargo. Such is not the case here. In the case at bar, there was no express agreement substituting the proceeds for the cargo, and the proceeds here were not in the possession of the consignees but had been *prepaid* to respondent Bank by means of the letters of credit. The filing of a lawsuit here cannot be equated with the contractual substitution made in *Jackie Hause. Jackie Hause* did not involve prepaid freights as does the matter at bar [See Part II, *infra*]; nor did it involve an unconditional release of cargo such as is present here, but rather was a case where the owner would not release the cargo until the proceeds were deposited.

Furthermore, the court in *Jackie Hause* was not concerned with "freight prepaid" bills of lading such as those issued by Compania, the issuance of which constituted a waiver of any lien at the time of issuance—which was substantially prior to the filing of this suit. [See Part IV, *infra*].

If the decision of the District Judge here were correct, it would entirely obviate the recognized rule, acknowledged in *Jackie Hause,* that the shipowner's lien depends on possession, for the reason that the shipowner could then ignore the cargo and the contractual claim against the charterer and simply proceed against third persons to whom the charterer caused the proceeds to be paid. Such a result is entirely incompatible with long accepted admiralty law. The *Jackie Hause* decision would be applicable here only if Compania had asserted a lien before the consignees *paid* respondent Bank. That was not done; therefore, Compania was limited to a possessory lien on the cargo which it surrendered, and that lien cannot be reinstated and attach to the monies paid to the Bank.

B. Even if the Shipowner's Lien Attached to Proceeds of Cargo (Which It Does Not) the Lien Cannot Be Traced to Funds in the Hands of Third Persons.

If the court were to hold (contrary to the authorities contained in Part A, *supra*) that the shipowner's lien on cargo extended to proceeds of cargo, it does not follow that the lien could apply to those proceeds after they have passed into the hands of a person other than the charterer.

It is established law that maritime liens are *stricti juris,* are to be narrowly construed and *may not be extended by construction, analogy or inference.*

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U.S. 490, 499 (1923);

Vanderwater v. Mills (*Yankee Blade*), 60 U.S. 82, 89 (1856);

State v. A/S Nye Kristianborg, 84 F. Supp. 775, 777-778 (D.C. Md. 1949) and cases collected.

The Supreme Court, in *Kaisha, supra,* refused to extend the maritime lien for breach of an executory contract to carry cargo and articulated the rule as follows:

> "The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore *stricti juris,* and cannot be extended by construction, analogy or inference." (260 U.S. at p. 499).

At no stage of this case have counsel for libelant cited any authorities which permitted the imposition of a shipowner's lien upon proceeds of cargo, much less proceeds which have passed into the hands of a third person.[14] The District Court's entire concept of im-

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[14]The cases cited below by libelant to support its "tracing" theory did not involve a shipowner's lien [e.g., *The Surico,* 42 F. 2d 935 (W.D. Wash. 1930)] and involved funds which were still in the hands of the charterer [*Bank of British No. America v. Freights of Hutton & Ansgar,* 137 Fed. 534 (2nd Cir. 1905)]. In the latter case, which contains the "tracing" language relied on by libelant, no shipowner's lien was involved and the court expressly relied on the fact that the funds were in the charterer's bank account (137 Fed. at p. 537). *The Surico* involved nonpossessory liens asserted by stevedores. These and other cases cited by libelant are discussed in more detail in Part II, *infra.*

posing a lien upon the attached funds in the hands of respondent Bank is based on the *extension* of existing lien rights—a result not permitted under maritime law. If it is assumed, *arguendo,* that the monies attached were proceeds of cargo susceptible to a lien while in the hands of the consignees of the cargo or the charterer (Kenray), it still does not follow that the lien would apply once the monies are paid by the consignees or charterer to third persons and there is no known authority so holding. The result urged by libelant is unsupported by any authority and no lien can be applied. [*Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra.*]

II.

The Attached Funds Were Not Subfreights Upon Which Libelant Had a Lien. Even if Libelant Had Such a Lien It Was Discharged Upon Payment of the Funds to Respondent.

As we have demonstrated in Part I, *supra,* the judgment here cannot be sustained upon the theory that the attached funds represent proceeds of cargo to which libelant's possessory lien on cargo attaches. Libelant asserts, then, that the attached funds represented subfreights, i.e., freight monies due to the charterer Kenray from third party shippers of goods,[15] and that the lien can be traced to the funds after they were paid to and received by respondent Bank.

To sustain this latter contention libelant must establish, as a matter of law, three essential elements of its claim, the absence of any one of which destroys

[15]"Subfreights" are so defined in Gilmore & Black, *op. cit.,* p. 208. As the context requires, the word "freights" is sometimes used to denote subfreights in the reported decisions.

the asserted lien. These elements are: (1) That the funds in the first instance, prior to payment to respondent, represented subfreights; (2) that under the terms of its charter party libelant had a lien on subfreights; and (3) that the lien, if it existed initially was not destroyed by the payment of the alleged subfreights either to Kenray or to respondent Bank prior to the time the lien was asserted. As we will now document, all three of these elements are lacking in the case at bar.

A. No Portion of the Funds Paid to Respondent Bank Upon the Letters of Credit Are Clearly Identifiable as Subfreights.

The funds paid to respondent were paid pursuant to drafts drawn by Kenray against nine letters of credit. These letters of credit were issued by foreign banks at the instance of the purchasers-consignees of the cargo of scrap to secure to Kenray the payment of purchase price of the scrap. The drafts drawn by Kenray in favor of respondent against these letters of credit represented such purchase price and the payment of the drafts was payment of the price of cargo.[16] The pay-

[16]Letters of credit are, of course, the long accepted means of arranging payment for the purchase of goods in international transactions. They usually provide, as they do here, for payment by the issuing banks of drafts drawn against the letters upon presentment of the drafts accompanied by the designated documents showing the specified goods to have been shipped. The purposes of a letter of credit are (1) to substitute the established credit of a bank (foreign or domestic) for the personal liability of the buyer, and (2) provide a sure, effective and convenient way of payment of the purchase price. [See generally *7 Am. Jur. Bills & Notes*, §224, pp. 917-920; *Gilmore & Black, op cit.*, Chapter 3.] The drafts drawn by Kenray were as though Kenray had drawn checks in favor of respondent against funds on deposit in the foreign banks. The payment of the drafts was payment of the purchase price to Kenray and, in turn, payment from Kenray to respondent.

ments and the letters of credit were in lump sums, with *no allocation* of any portion thereof to freight charges [Exs. 4A-41]. The absence of any such allocation precludes the funds or any portion thereof from being deemed subfreights.

Subfreights are monies which are owed by a third party shipper to the charterer as compensation for the carriage of cargo and which are specifically stated and indicated to be for such carriage. [*Gilmore & Black, op. cit.,* p. 208; *Scrutton on Charter Parties* (15th Ed.) p. 366; *American Steel Barge Co. v. Chesapeake & O. Coal Agency,* 115 Fed. 669, 672 (1st Cir. 1902); *United States v. Freights, Etc., S. S. Mt. Shasta,* 274 U.S. 466 (1927).][17] In the case at bar, no part of the $535,-371.27 received by respondent in payment of the drafts was indicated specifically to be in payment of freight but rather said sum was simply a lump sum payment for the goods purchased. Consequently, it cannot be said that there were any subfreights involved to which a lien in favor of the shipowner could apply. There being no specific subfreights, libelant's asserted lien must fall.[18]

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[17]*Scrutton on Charter Parties* states that freight (or, in this instance, subfreight) is ". . . the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition, ready to be delivered to the merchant." Subfreight, in the context of a charter party, is the amount owing from a shipper to the charterer as freight. In *American Steel Barge,* the court said that subfreights "embrace all freights which a *charterer* stipulates to receive for the carriage of goods, whether he takes the ship by demise or otherwise".

[18]It is not disputed that Kenray received from Purdy International Corp. the additional sum of $9,980.20 as payment for the carriage aboard the Searaven of goods sold by Purdy. This sum was deposited by Kenray into its commercial checking account with respondent Bank, and subsequently set-off upon Kenray's in-

(This footnote is continued on the next page)

Libelant argued below that the court should *infer* that a portion of the $535,371.21 received by libelant is subfreight because the consignees required the shipments to be C.I.F., i.e., a lump sum for cost of goods, insurance and freight. The District Court made such an inference and based thereon found that the sum of $96,750.00 should be allocated as reasonable subfreights and carved out of the monies received by the Bank.[19] That result cannot be sustained:

First, to make such an inference, the Court was required to deviate from the long accepted principle that liens in admiralty proceedings are *stricti juris* and may not be extended by inference, analogy or construction.

> E.g., *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*, 260 U.S. 490, 499 (1923); *Vanderwater v. Mills, supra*, 60 U.S. 82, 98 (1856).

Second, there was no evidentiary basis for determining what portion of the $535,371.21 was to be allocated as subfreights. It was speculation to assume any portion thereof attributable to freight, just as it would be speculation to assume any portion allocable to the cost of insurance, the cost of the goods themselves, the cost of Kenray's overhead or the cost of any other item of expense that goes into a package sale. The sale here was a lump-sum price and it is equally (if not more) inferable that Kenray, in order to make the total deal, was itself absorbing the cost of the freight.

Third, in a C.I.F. contract, the obligation for the payment of freight is that of the *seller-shipper* (Ken-

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debtedness. We concede that said sum of $9,980.20 was subfreight; we would not concede however, that there is any lien thereon (See Parts B and C, *infra*).

[19] [R. 224, Find. 20; R. 197, Opinion p 6.]

ray) and not that of the consignees. The consignees in such a contract are obligated to pay nothing on account of the transportation charges [*Warner Bros. & Co. v. Israel,* 101 F. 2d 59, 61 (2nd Cir. 1939); *Calif. Commercial Code,* Sec. 2320]. This being so, there is nothing due or owing from the consignees to the charterer (Kenray) for transportation charges—there being nothing due to the charterer for transportation costs, there are no subfreights.

To support the conclusion that $96,750.00 was here to be allocated as quasi-subfreights even though Kenray was both charterer and shipper, the District Judge relied upon *Whitney v. Tibbol,* 93 Fed. 686, 688 (9th Cir. 1899) and similar decisions cited below, all of which involved liens for seaman's wages.[20] For several reasons, those cases have no application here:

First, as noted, the cited decisions all involved an assertion of a lien for unpaid seaman's wages. None of the cases involved a contractual shipowner's lien granted under the terms of a charter party such as that asserted in the case at bar. A seaman, unlike a shipowner, has *no lien upon cargo* but is limited to a lien on the vessel or upon its freights. [See cited decisions and also 1 *Benedict on Admiralty* (6th Ed.), Section 80, page 249.] Therefore, a seaman may ordinarily not assert a lien upon cargo for unpaid wages. In the cited cases (which refer to situations where the owner of the cargo was also the owner or charterer of the ship so that there was no freight money available for the seaman's lien) what was done to protect the

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[20]*Poland v. The Spartan,* 19 Fed. Cas. No. 11246 (D.C. Maine 1828); *Clifford v. Merritt-Chapman & Scott Corp.,* 57 F. 2d 1021 (5th Cir. 1932); and *Vlavianos v. The Cypress,* 171 F. 2d 435 (4th Cir. 1948).

seaman was to designate a "reasonable freight" and then allow the seaman to assert a lien in such amount *directly against the cargo.* Thus, the cases do not involve a situation where freight is "carved out" so as to permit the assertion of a lien against the freight money, but rather involve the assertion of a lien against cargo to the extent of a reasonable allowance for freight. To designate reasonable freight, so as to allow the assertion of a lien against cargo (as was done in the seaman cases) is substantially different from designating a sum as freight and allowing a lien directly against that sum as the District Judge did here. In the case at bar libelant is not attempting to assert a lien against cargo to the extent of reasonable freight (i.e., the seaman's lien cases) but is rather attempting to assert an independent lien against freights or proceeds. The seaman's cases are therefore not in point. Libelant has cited no authority where freight, in a situation such as that existing in the case at bar, was implicitly established for the benefit of a shipowner.

Second, the seaman's cases are also not applicable in that the seaman's lien is a preferred maritime lien [See *Robinson on Admiralty,* pages 286, 369; Gilmore and Black, *The Law of Admiralty,* pages 514, 596], whereas the owner's lien (which is the lien involved herein) is created solely by the contractual provisions of a charter party. In the cited cases the court permitted the seamen to lien the cargo to the extent of unpaid freight in order to avoid a total absence of remedy for the seaman. Here, libelant had a remedy since it had a direct lien on cargo and there is no need for the creation of an indirect lien.

In summary, there is no basis upon which it can properly be concluded that any portion of the $535,-371.21 paid to respondent represented subfreights and, accordingly, there is nothing to which the alleged lien could apply.

B. The Charter Party Does Not Grant to Libelant a Lien on Subfreights.

Assuming that the court sustains the finding of the District Court that $96,750.00 of the monies received by respondent Bank should be "carved out" as subfreights, libelant must then demonstrate that it had a lien upon subfreights in the first instance.[21] If there initially was no lien on subfreights in favor of libelant, then there need be no consideration of the extent or duration of that lien or the loss thereof by actual payment of the subfreights prior to assertion of the lien [Part *C, infra*].

It is established admiralty law that a shipowner does not have a lien upon subfreights owed to a charterer *except as a result of an express grant in the charter party relating to the charter of the vessel earning the subfreights.*

In re No. Atlantic & Gulf S.S. Co., 204 F. Supp. 899, 904, 906 (S.D. N.Y. 1962) aff'd *sub nom Schilling v. A/S D/S Dannebrog,* 320 F. 2d 628 (2nd Cir. 1963). [Court stating: "Shipowner's liens on earned subfreights due to a charterer are based on an ancient and standard charter provision,

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[21]Our point in Part *A, supra,* is that there are no identifiable subfreights. In Parts *B* and *C* we assume to the contrary that the inferential finding of the District Judge is sustained and demonstrate that the Judgment must nevertheless be reversed as a matter of law.

the origins and history of which are somewhat obscure. It is clear, however, that no such lien can arise without an express grant in the charter of the vessel earning the subfreights . . . The lien cannot arise unless there is a specific lien clause written into the charter party." (204 F. Supp. at 904) and "Liens on subfreights derive entirely from some specific provision in the charter of the vessel and have no basis other than that." (204 F. Supp. at 906)][22]

Ocean Cargo Lines v. No. Atl. Marine Co., 227 F. Supp. 872, 880 (S.D. N.Y. 1964) [Court stating: "A shipowner's lien on earned subfreights owing to a charterer depends upon the inclusion of a specific lien clause in the charter of the vessel earning the subfreights."]

See also:

Hall Corp. v. Cargo ex Steamer Mont Louis, 62 F. 2d 603, 605 (2nd Cir. 1933) and cases collected;

Actieselskabet Dampsk, Thorbjorn v. Harrison & Co., 260 Fed. 287, 290 (S.D. N.Y. 1918);

Gilmore & Black, op. cit. p. 517, note 103 and cases collected;

Poor, *Charter Parties and Bills of Lading*, (4th Ed. 1948) p. 46.[23]

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[22]In the cited case, the charter did contain a provision for a lien on subfreights. The pertinent provision of the charter was ". . . owners shall have a lien upon all cargoes, and all subfreights . . ." (204 F. Supp. at 904). This clause differs substantially from the lien clause in the case at bar (*infra*).

[23]The author states: "Much litigation has arisen respecting the effect of giving the owner a lien upon cargoes and subfreights. Without an express clause giving a lien none would exist . . . If the owner wishes to retain his lien he should expressly contract to that effect."

The charter party involved in the case at bar (Ex. 1) contains *no provision* for a lien on subfreights. The lien reserved therein is by agreement limited to a lien on cargo. The subject provision (Par. 8) reads in pertinent part as follows:

> "Owners shall have a lien on the cargo for freight, dead-freight demurrage . . ."

Since the lien provision herein makes no reference to a lien on subfreights there can be none. This being so, the *in rem* claims of libelant must fail even if any portion of the funds attached are deemed subfreights.

In making this argument that the subject charter party makes no provision for a lien on subfreights, we are not unmindful of the statement made in *N. H. Shipping Corp v. Freights of the S. S. Jackie Hause,* 181 F. Supp. 165 at 170 (S.D. N.Y. 1960) upon which the Court below relied, that a lien on cargo is a lien on freights, but we believe that decision not to be controlling here for several reasons: (1) The statement of the District Court in *Jackie Hause* is in conflict with other opinions of the Second Circuit (cited above) that there must be a specific reservation in the charter of a lien on subfreights; (2) *Jackie Hause,* in making the statement, relied upon *Jebsen v. A. Cargo of Hemp,* 228 Fed. 143 (D.C. Mass. 1915) which upon analysis was a case involving a lien asserted against cargo and not against subfreights; (3) The facts in *Jackie Hause,* unlike those in the case at bar, were that the cargo was conditionally discharged and the freight monies impounded by agreement of the parties in lieu of cargo—so that there was a contractual substitution of freight monies for cargo—in this regard, the District Judge in *Jackie Hause* noted (at p. 170) that the limitation of

the lien in the charter party to cargo "might be significant under other circumstances"; and (4) *Jackie Hause* in fact did not involve subfreights as such since the owner there was in direct privity with the consignee by reason of the substitution of a vessel other than that originally under charter. *Jackie Hause* is therefore distinguishable upon these grounds and not controlling here. Consequently, under the charter party herein, there is no lien upon subfreights.

C. Any Lien on Subfreights That Libelant May Have Had Was Discharged Once the Subfreights Were Paid to Respondent or to Kenray.

Assuming, *arguendo*, that this court sustains the conclusion that $96,750.00 of the attached funds are identifiable sub-freights and that libelant had a lien on subfreights under the provisions of the charter party, we reach the crucial substantive question of whether that lien was lost and discharged when the subfreights were paid to Kenray or to respondent.[24] We submit that it is beyond dispute that the lien was so lost and discharged.

The admiralty decisions are unequivocal that where a shipowner has a lien upon subfreights such lien is *lost and discharged once the subfreights are paid*—that is, the lien is valid only so long as the subfreights are *owed* to the charterer or its successor and *if the sub-*

[24]That the alleged subfreights have been paid by the consignees is undisputed. It was stipulated and found that the proceeds of the letters of credit were paid by the consignees when Kenray drew drafts in favor of respondent against the letters. The Purdy subfreights were paid by Purdy to Kenray, deposited and then set off.

freights are paid before the shipowner asserts its lien, the lien is lost forever.

In re North Atlantic & Gulf Steamship Co., supra, 204 F. Supp. 899, 904 (S.D. N.Y. 1962) aff'd *sub nom Schilling v. A/S D/S Dannebrog,* 320 F. 2d 628 (2nd Cir. 1963);

Hall Corp. v. Cargo ex Steamer Mont Louis, 62 F. 2d 603, 605 (2nd Cir. 1933);

American Steel Barge Co. v. Chesapeake & O. Coal Agency, 115 Fed. 669, 676 (1st Cir. 1902);

Poor, op. cit., p. 48;

Stephens, on Freight, p. 200;

Gilmore & Black, op. cit., p. 208 and cases collected.[25]

In the *No. Atlantic* case, *supra,* the rule is stated as follows:

> "The shipowner's lien on subfreights permits him to obtain payment of monies due under the charter out of such subfreights earned by the vessel as remain *unpaid* by a shipper to the charterer (authority) . . . *If the cargo is delivered and the shipper pays the subfreights to the charterer in good faith, the shipowner's lien falls* (authority)." (emphasis ours) (204 F. Supp. at 904)

In *Poor, supra,* the author states:

> "Once the freight has been paid over to the person entitled to receive it, it loses its character as freight and is no longer subject to a lien."

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[25]See also: *The Mt. Shasta,* 274 U.S. 466, 471 (1927) where the court, in sustaining *in rem* jurisdiction, indicated that the question of whether there were any subfreights "due" from the third-party shipper was to be determined upon trial.

Gilmore & Black, at p. 208, state the rule as follows:

> "The [Charter-party] provisions for liens on cargo and subfreight can apply only when there is freight actually owing on a shipment of goods; payment in the ordinary course to the charterer by the third-party shipper discharges the latter's obligation and with it the lien."

The rule is stated in *Stephens, on Freight, supra,* as follows:

> "But such a lien can only be exercised before the subfreight has been paid to the charterer of the ship or his agent. The *lien confers no right on the shipowner to follow the subfreight after it has been paid.*" (emphasis ours).

It is significant that the foregoing authorities speak in terms of the lien "falling" or being "discharged" upon payment of the subfreights and that the owner may not "follow" the monies. Since the lien is discharged (and not merely subordinated) it is immaterial whether the controversy is between the owner and the consignees or between the owner and any other party. Once the subfreights are paid there is no longer any lien. It is also significant that the authorities make it clear that the lien on subfreights falls when the monies are paid to the charterer; it would follow, then, *a fortiori*, that the lien also falls when the monies are paid to a third party such as respondent Bank who has no contractual relationship with the owner; if, as appears from the authorities, the lien falls and is discharged upon payment, no question of tracing or priorities arises because there simply is no lien to trace.

It is clear from the foregoing authorities that if Compania were to assert a lien on subfreights, it was

required to do so while the subfreights remained unpaid, that is, in the hands of the third party shipper (Purdy) or the Taiwan consignees. It could have asserted such lien by libeling or attaching the subfreights while they remained unpaid or even by giving appropriate notice to the consignees before payment was made.[25a] Compania failed to assert a lien before payment and may not now do so.

Further supporting the result that a shipowner is not entitled to a lien on subfreights which were prepaid to the charterer are the admiralty cases where it has been held that a mortgagee of a ship and its freights acquires no rights to freights which have been received by the mortgagor or its assigns before possession is taken by the mortgagee.

E.g.

Layne & Bowler v. U.S. Shipping Board, 27 F. 2d 39, 41 (9th Cir. 1928);

Merchants Banking Co. v. Cargo of Afton, 134 Fed. 727, 728 (2nd Cir. 1904).

The analogy between a mortgagee of a ship who is not in possession and the owner where there is a char-

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[25a]On this point, innumerable common-law analogies come readily to mind. *E.g.*, the requirement that a garnishment be levied *before* the garnishee makes payment to the defendant; the giving of notice of the assignment of an account receivable *before* payment is made by the obligor to the assignor; the recordation of a mechanic's lien within the statutory time; the giving of notice of an assignment of a judgment *before* payment of the judgment is made. A most appropriate analogy is to a mortgagee of real property who is not in possession - that mortgagee has an inchoate lien on the rents derived from the property but the lien does not reach rents paid by the tenants to the mortgagor before the mortgagee exercises his lien by appropriate notice or proceedings. [See *Malsman v. Brandler*, 230 Cal. App. 2d 922, 923-924 (1964).]

ter is obvious and in either case the lien holder has no claim to freights paid before the lien is asserted. That analogy has been noted by this Court. [*Schirmer Stevedoring Co. Ltd. v. Seaboard Stevedoring Corp.*, 306 F. 2d 188, 192 (9th Cir. 1962)].

Libelant has cited no case (and we know of none) sustaining a shipowner's lien on subfreights where the subfreights have been paid to the charterer prior to assertion of the shipowner's lien. This being so, the District Court erred in going even farther by applying a lien on funds which have passed out of the possession of the charterer.

The theory of the shipowner's lien on subfreights is that the shipowner is contractually subrogated (under the lien clause of the charter agreement) to the charterer's right to receive payment of the subfreights. [See [*American Steel Barge Co. v. Chesapeake & O. Coal Agency, supra*, 115 Fed. at 674.] Once the subfreights are paid, however, there is no longer anything to which the lien can attach or to which the owner can be subrogated.

That the lien is lost regardless of whether the subfreights are paid to the charterer (Kenray) or paid to a creditor of the charterer (respondent Bank) is demonstrated by one aspect of the decision in *In re North Atlantic & Gulf Steamship Co., supra*. One of the issues in that case (discussed at 204 F. Supp. 906) was whether certain attachments of earned (and unpaid) subfreights which had been levied by creditors of the charterer were tantamount to payment of the subfreights so as to defeat the lien of the shipowner. The court held that had the creditors obtained a judgment against the charterer and satisfied the same out of the

funds attached "plainly the shipowner's lien would be lost." Thus, the court held that if a creditor of the charterer *receives* the subfreights the shipowner's lien is discharged. The court went on to point out that the attachments themselves would have been sufficient to defeat the shipowner's lien except that they were voidable as having been obtained within four months of the charterer's bankruptcy and hence not perfected.[26] The teaching of the case is clear: If a creditor of the charterer perfects the right to receipt of the subfreights before the shipowner's lien is asserted (and *a fortiori* if the creditor actually receives them) the shipowner's lien falls. Such is the case at bar.

The authorities which libelant cited below in support of its contentions do not support the existence of a lien in its favor upon the attached funds which were in the possession of respondent Bank. *Bank of British No. America v. Freights etc. of Hutton and Ansgar,* 137 Fed. 534 (2nd Cir. 1905) did not involve the assertion (as here) of a lien by the shipowner; in *Ansgar* the issue was whether a Bank, which had received from the charterer of a ship an assignment of freights, could prevail over the charterer's administrator with respect to freights which had been received and deposited into the charterer's account; the court held in favor of the bank. *Ansgar* was a case which not only was unrelated to shipowner's liens, but also involved disputes between the contracting parties

[26]The cited case was decided in the context of Chapter X bankruptcy proceedings. In the case at bar the payments to respondent Bank were clearly perfected and there are no bankruptcy proceedings involved. The *North Atlantic* case, then, involved not only the question of the shipowner versus consignees, but also the shipowner versus creditors of the charterer who may have perfected receipt of the subfreights.

and not third parties. While the case does speak of tracing of liens, it does so in the context of a non-shipowner's lien and with respect to funds which were still in the possession of the charterer and had not been paid to third persons; furthermore, in *Ansgar* the court made an express finding, upon which it based its holding, that there was an agency agreement which obligated the charterer to collect the funds for the benefit of the bank. The court clearly indicated (at p. 537) that the Bank's lien applied so long as the funds were in the hands of the charterer or in his bank account—the case does not support a tracing of any lien to funds passing into the hands of third persons, especially where, as here, that third person is not in privity with the lien claimant. Thus, the case is inapplicable not only because it does not involve a shipowner's lien (which by law is lost on payment of the subfreights) but also because it involved funds still in the possession of the charterer which were required by agreement to be held by the charterer for the benefit of the bank.

The Surico, 42 F. 2d 935 (W.D. Wash. 1930), also cited below by libelant, also did not involve a shipowner's lien. In *Surico* the lien was that of a stevedore and the holding of the case was that the stevedore's lien could not be defeated by novation agreement between the shipowner and the charterer. In *Surico* the court was not concerned with the lien of a shipowner or the tracing of monies into the hands of a third party not in privity with the charter party agreement; the stevedore lien there was asserted to monies still in the hands of the parties to the charter agreement and the case has no factual similarity to the matter at bar. The lien involved in *Surico*, being for stevedoring charges,

was that of a maritime supplier and, hence, a non-possessory lien. It did not involve, as here, the rights of the shipowner to cargo or subfreights.

Freights of the Kate, et al., 63 Fed. 707 (S.D. N.Y. 1894) relied upon by Compania, involved a case where the freights had not yet been paid to the charterer and the assignment thereof remained completely executory, both in the sense that it was on unearned freights and that the freights were unpaid to the charterer or its assignee at the time of the assertion of the shipowner's lien. Hence, the case is of no support to libelant here. The subfreights in the *Kate* had in fact subsequently been collected by the shipowner and deposited by the shipowner in court subject to the order of the court. The *Kate* would be helpful to Compania only if it had asserted its lien against the alleged subfreights of the Searaven before they were paid to Kenray or to respondent. The court in *The Kate* specifically noted that the assignee of the freights had not received *payment* thereof (see discussion p. 712), and was therefore passing upon executory rights as distinguished from a lien asserted against prepaid freights.

The case of *N. H. Shipping Co. v. Freights of the S. S. Jackie Hause,* 181 F. Supp. 165 (S.D. N.Y. 1960) which we have previously discussed in part, was the principal authority cited below by libelant and was strongly relied upon by the District Judge in reaching his result. The case does not sustain the judgment. Insofar as that decision dealt with subfreights the case is distinguishable in that the monies owed by the consignee were clearly for the shipment of cargo (and not, as here, a lump-sum purchase price) and the subfreights had not been paid by the consignee but had been *impounded*

pending trial. The court noted that the impounding of the subfreights had been an express condition of the release of the cargo to the consignee (also a fact not present here) and that this conditional delivery was the fact which prevented the shipowner's lien from being discharged (p. 171). In the case at bar there was not, and could not have been, such an impounding since any funds due from the consignees of the Searaven's cargo had been *prepaid* before Compania's lien was asserted. There is also a major question in *Jackie Hause* of the validity of the assignment of the freights because of the substitution of vessels (see discussion 181 F. Supp. at p. 170); therefore the case is distinguishable upon that further ground even if libelant were correct (which it is not) that in determining priorities an executory assignment of freights is to be equated with actual payment thereof. A creditor of the charterer who has received actual payment of the subfreights prior to assertion of the shipowner's lien by appropriate process (as distinguished from an executory assignment thereof) takes priority over the alleged lien of the shipowner since the shipowner's lien, as a matter of law, has ceased from the moment of payment. [*In re North Atlantic & Gulf Steamship Co., supra*, 204 F. Supp. at 906.][27]

American Smelting & Refining Co. v. Naviera Andes Peruana, S.A., 208 F. Supp. 164 (N.D. Cal. 1962) aff'd

[27]As we noted above, the court in *North Atlantic* held that if creditors of the charterer who had attached the subfreights on claims unrelated to the voyage had succeeded in receiving actual payment of their claims from the attached funds "plainly the shipowner's lien would have been lost." If this be the result on the involuntary satisfaction of an attachment, the same result must follow *a fortiori* on the satisfaction and payment of a voluntary assignment such as was accomplished in the case at bar.

sub nom, San Rafael, Etc. v. American Smelting Etc., Co., 327 F. 2d 581 (9th Cir. 1964), cited by libelant, is distinguishable in that the monies involved, which were unequivocally subfreights, had not been paid by the third party shipper to the charterer or its successor, but rather had been interpleaded and deposited in court. Furthermore, the citation of the case even for the proposition that an owner's lien prevails over an executory assignment cannot be sustained since the court there found that there had been inadequate proof of the validity of the alleged assignment and made its decision upon that ground and not upon any legal issue of priorities.[28]

American Smelting actually supports the Bank's position herein in one important aspect. The case involved conflicting claims to unpaid subfreights earned by a voyage of the S. S. Ocean Alice and the unpaid portion of subfreights owed from three prior voyages of the Ocean Alice and two other ships. Ninety-five percent of the subfreights from these prior voyages had been previously *paid* to the charterer's assignee through its bank. No issue or contention was made that the ship-

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[28]In the opinion of the District Judge cited at 208 F. Supp. 164 at 169 (1962), it is said: "While it is well established that freights of a voyage may either be sold outright by assignment or assigned as security for a loan, [the alleged assignee] has failed in its burden to show a valid assignment has been made of the freights of the second voyage of the Ocean Alice." The most the *American Smelting* and other decisions relied on by libelant could be cited for is the proposition that a shipowner's lien has priority over an *executory* assignment of subfreight if the lien is asserted before payment of the subfreights by the party liable therefor. This point, even if conceded, does not help libelant here since we are not dealing with an executory assignment, but rather with subfreights which were prepaid before assertion of the shipowner's lien.

owners had any lien upon the subfreights previously paid (as distinguished from the unpaid portion of the subfreights which were in issue) and the possession of the paid subfreights was not disturbed. Therefore the court as well as the parties implicitly drew a distinction between unpaid and paid subfreights and in the latter case indicated that there was no shipowner's lien thereon. Applying the result reached in *American Smelting* case to the matter at bar it is apparent that libelant's lien under any circumstances could only be as to any unpaid freights owed by the consignees or shippers. Any lien upon the freights which have been paid, was discharged upon payment.

Luckenbach Overseas Corp. v. Subfreights of S.S. Audrey J. Luckenbach, 232 F. Supp. 572 (S.D. N.Y. 1963), another case cited below by libelant, is equally non-supportive of the judgment in the case at bar, and in fact supports the contentions of respondent. In *Luckenbach* the libel was against freight monies which were still in the hands of the shipper and which were admittedly due (i.e., unpaid subfreights) and was a contest between a vessel owner and a stevedore. The court held that the stevedore, by reason of a "prohibition of lien clause" in the charter party, could assert no lien on the vessel or its subfreights and the stevedore's executory, unperformed assignment of subfreights was to freights which were unpaid and therefore still subject to the owner's lien. The case, then, is dissimilar to the present proceeding which involves alleged subfreights which have been entirely paid and therefore no longer subject to any lien in favor of the shipowner. This distinction (i.e., the loss of the shipowner's lien upon payment of the subfreights) which

is the major issue in the case at bar, was noted by the court in *Luckenbach* on rehearing and stated as follows:

> "The subfreights had not been paid by Barr [the third party shipper] and these proceedings were commenced by the owner to execute its lien.
>
> "*Of course, had Barr paid the charterer, the situation as to Barr would be different. But there has been no payment.*" (232 F. Supp. at 577 (emphasis ours)

Thus the court noted the very point respondent asserts here: that regardless of the relative priorty of the shipowner's lien before the subfreights are paid, if they are paid before the lien is asserted, the shipowner's lien falls and is no longer applicable to the paid subfreights.

The case of *Schirmer Stev. Co. Ltd. v. Seaboard Stev. Corp.,* 306 F. 2d 188 (9th Cir. 1962) relied upon by libelant and which also involved unpaid subfreights, is similarly distinguishable. That case involved substantially the same parties as *American Smelting* and once again the court held that the purported assignment was inoperative since the vessel was withdrawn by the owners before the freights covered by the assignment were earned. Therefore, *Schirmer,* like *American Smelting,* was not decided upon the issue of priorities, but rather upon the factual finding that the assignment was ineffective. The court in *Schirmer* expressly declined to pass on what the relative priorities would have been had the executory assignment been valid. (See discussion 306 F. 2d at 191-192).

There is a further aspect of *Schirmer* which is worthy of note. That case also involved the rights of certain attaching stevedores *vis a vis* the shipowner;

these stevedores attached the subfreights on independent claims not related to the voyage in question. Therefore their attachments stood in the same position as the claim of a general creditor of the charterer. The attaching stevedores contended that their attachments had priority over the shipowner's lien. That contention, if sustained, would clearly support the proposition that the shipowner's lien cannot be traced to funds paid to the charterer or its successor in interest. The court in *Schirmer* rejected the stevedores' contention but, significantly, not for the reason that the shipowner's lien was superior, but rather because the attachments were levied prior to the time that the subfreights became payable. Thus the court indicated that had the attachments been validly perfected such attachments would have had priority over the shipowner's lien. The case therefore is entirely consistent with the determination that any shipowner's lien is discharged if the subfreights are paid the charterer (or voluntarily or involuntarily assigned to a creditor of the charterer) prior to the time the shipowner's lien is asserted by appropriate process. [*In re North Atlantic & Gulf Steamship Co., supra.*]

Where a shipowner asserts a lien on unpaid subfreight, the subsequent payment of the third party shipper to a person other than the owner is at the shipper's own risk and does not discharge his liability for the subfreight. Thus, the assertion of the lien is akin to a garnishment. But even such assertion of the lien would not confer the right upon the shipowner to "trace" the lien to the monies paid by the shipper to any other person, and there is no known authority so holding. Therefore, if libelant herein were correct

that its lien was not discharged by prepayment of the alleged subfreight by the consignees, while the consignees might remain liable it would not necessarily follow that the lien could be "traced" and respondent Bank held liable. In other words, the burden is upon libelant to show as a matter of law, not only that it has a lien, but also that it can assert that lien against respondent as distinguished from Kenray or the consignees. There is no authority sustaining such burden. The assertion of libelant that it has a shipowner's lien on subfreights merely begs the issues here. Those issues are (1) has the lien been discharged by the payment of the subfreights and (2) if the lien exists, can it be traced and applied to funds held by third persons. Both issues must be answered adversely to libelant.

In summary, libelant has cited no authority, and we have found none, which supports the judgment below that the shipowner's lien on subfreights exists after the subfreights are paid to the charterer or a third person. What authority does exist is directly contrary to the judgment here and no maritime lien can be sustained upon the funds under attachment. In *Galban Lobo Trading Company S/A v. Diponegaro,* 103 F. Supp. 452 (S.D.N.Y. 1951), where the court in an analogous case refused to extend to a cargo owner a lien on freights which it had prepaid, the court made a statement which is indeed apropos of the claim made by libelant in the case at bar:

> "The law of the sea has passed that period when even the most ingenious and resourceful of proctors might father new rights; it has long left behind the time for the development or belated recognition of maritime liens heretofore unknown and unsuspected." (103 F.Supp. at 453).

III.

The District Court Was Without Jurisdiction to Determine Purely Equitable Claims. In Any Event There Is No Substantive Basis for Its Conclusion That the Bank Was a Constructive Trustee.

Anticipating that its position could not be sustained upon a maritime basis, Compania at pre-trial interjected a claim that it had an equitable lien upon the funds received by the Bank, and that the Bank was a constructive trustee for the benefit of Compania. Objections to the consideration of that non-maritime claim were made by the Bank at pre-trial and trial.[29] The District Judge, however, concluded that he had jurisdiction to consider the claim,[30] and that the Bank received the proceeds of the letters of credit and the Purdy subfreights "as a constructive trustee for the benefit of libelant to the extent that libelant's charter-hire was unpaid,"[31] and that it would be "inequitable" if the Bank could avoid payment to libelant. We respectfully submit that such conclusions are erroneous as a matter of law.

A. The District Court Sitting in Admiralty Had No Jurisdiction to Consider an Independent Equitable Claim.

It is settled that where underlying maritime jurisdiction exists, an admiralty court has jurisdiction to hear and determine equitable matters which are *incidental* to the maritime claim. [*Swift & Co. Packers v. Compania Colombiana Del Caribe S.A.*, 339 U.S. 684, 70

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[29] [R. 181; Rep. Tr. 36-37].

[30] [R. 198-200 (Opinion pp. 7-8); R. 226 (Conclusion 3)].

[31] [R. 226-227 (Conclusions 8, 8A, 8B)].

S. Ct. 861, 94 L. Ed. 1206 (1950)].[32] It is equally settled, however, that the admiralty court, even after acquiring jurisdiction, may not enforce independent equitable claims. Thus in *Swift,* it was said:

> "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property." (339 U.S. at 690).

The difference, for jurisdictional purposes, between an incidental claim and one seeking independent relief was considered by this court in detail in *Putnam v. Lower,* 236 F. 2d 561, 568 (9th Cir. 1956). In so doing, this court recognized that certain types of claims, including that of constructive trust asserted here, are unequivocally independent and not in admiralty jurisdiction. This court said:

> "While admiralty courts are flexible in operation and are often said to act as courts of equity, it does not necessarily follow that they possess jurisdiction concurrent with that of equity, but rather that having once secured jurisdiction as an admiralty court, they may proceed in the trial of the cause on equitable principles. Thus, admiralty 'cannot entertain a bill or libel for specific performance, or to correct a mistake, * * * *or declare or enforce a trust or an equitable title* * * * or exercise jurisdiction in matters of accounts merely * * *'. Nor does admiralty have jursdiction extending to actions seeking affirmative relief from fraud, or seeking to set aside or reform contracts, merely because there is a maritime flavor to the transaction." (empahsis ours.)

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[32]In *Swift,* the Supreme Court held that a court of admiralty could consider, for purposes of attachment, a claimed fraudulent transfer of a vessel.

While this court in *Putnam* adhered to the "incidental equities" rule, it is clear from the decision that certain types of claims, including claims to impose a constructive trust, are by their very nature considered independent and outside the scope of admiralty jurisdiction. This case falls within that class; Compania's constructive trust theory was clearly not an incident to its alleged maritime lien, but is rather a separate and alternative claim.[33] *Putnam*, moreover, establishes that where (as here) the equitable matter is asserted affirmatively rather than defensively, less latitude should be allowed in accepting jurisdiction.

Claims which are independently equitable in nature, even though flavored with maritime facts, have consistently been held to be outside the jurisdiction of the Admiralty Court. An apposite case demonstrating that there was no jurisdiction to consider Compania's claim of constructive trust, even though joined with a claim of maritime lien, is *Port Welcome Cruises, Inc. v. S.S. Bay Belle*, 215 F. Supp. 72, 84-85 (D.C. Md. 1963); aff'd. *sub. nom. Humble Oil & Refining Co. v. S.S. Bay Belle*, 324 F. 2d 954 (4th Cir. 1963). In *Port Welcome* the court was called upon to determine the validity and relative priorities of certain ships' preferred mortgages and other maritime liens upon vessels, where the holder of the mortgages also held additional security interests in non-maritime property; the court initially held that the ships' preferred mortgages were valid and had statutory priority. The junior maritime lienors then asserted that since the senior mortgagees

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[33]It cannot be questioned that an action to establish a constructive trust lies exclusively in the field of equity [See *Black v. Boyd*, 248 F. 2d 156, 162 (6th Cir. 1957).]

held other non-maritime security, a constructive trust should be impressed on that security so that there could be a marshalling of assets. The court refused to impose such a trust as being outside its admiralty jurisdiction, and after reviewing *Swift* and other authorities said:

> "[B]ut this extension of the doctrine that courts of admiralty may apply equitable principles has been extended only to matters which are subsidiary but a necessary adjunct to full maritime relief . . .
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> "In the cases at bar, the lienor's contention would require the Court, not only to apply equitable principles but to apply those principles to non-maritime property, here, Riverview Beach Park. It would require the Court to impose a constructive trust on this piece of realty and, of course, administer such a trust. No cases have been cited, nor has any been found, where a trust has been imposed on non-maritime property by an admiralty court, except in perhaps a limitation of liability proceeding. (authority) It is concluded that this Court does not have such jurisdiction." (215 F. Supp. at 85)

See also:

The Eclipse, 135 U.S. 599, 608, 10 S. Ct. 873, 34 L. Ed. 269 (1890) [Holding that admiralty court had no jurisdiction to determine claims of equitable title to a vessel.]

F. D. Marchessini & Co. v. Pacific Marine Corp. 227 F. Supp. 17, 20 (S.D. N.Y. 1964) [Holding that action for accounting of funds under ship agency agreement not within in-

cidental admiralty jurisdiction even though respondent was to collect freights and receipts from operation of ships.]

Economu v. Bates, 222 F. Supp. 988, 991-92 (S.D. N.Y. 1963). [Action alleging agreement to become co-owner of vessel and to share freight monies from operation held not to be within admiralty jurisdiction.]

The District Court here, in assuming jurisdiction over a specific equitable claim, went far beyond the incidental relief concept. This is demonstrated by the complete absence of any cited case in which a constructive trust was found or declared by an admiralty court upon non-maritime property such as the funds received by the Bank. If the holding of the District Court is sustained, admiralty jurisdiction over equitable claims could always be obtained by the expediency of joining a maritime lien claim, no matter how groundless. Certainly, such a boot-strapping of jurisdiction was not contemplated by *Swift* and is inconsistent with the history of the admiralty. In summary, then, we believe that the District Court erroneously concluded that it had jurisdiction to pass upon Compania's equitable claims.

B. There Is No Substantive Basis for the Imposition of a Constructive Trust and the Findings of the District Court Do Not Support Its Conclusion.

Assuming, *arguendo*, that jurisdiction is sustained, the judgment of the District Court must nevertheless be reversed in that the findings of the District Court do not support its conclusion that a constructive trust should be imposed and none of the elements of a constructive trust are present.

It is hornbook law that a constructive trust may be imposed only where one acquires property to which he is not entitled by reason of fraud, accident, mistake undue influence or the violation of an express trust or confidential relationship.

California Civil Code, §2224;

4 Witkin, *Summary of Calif. Law*, pp. 2970-2972;

Bogart, *Trusts and Trustees* (2nd Ed.) §471-475;

Scott on Trusts (3rd Ed.) Vol. V. §462.2;

Restatement, *Restitution*, 160 and comments;

89 C.J.S. *Trusts*, §139, pp. 1015-1024.

An extraordinary degree of proof is required to establish a constructive trust and the evidence must be clear and convincing so as to leave no reasonable doubt as to the existence of the trust.

E.g.

Fowler v. Security-First Nat. Bank, 146 Cal. App. 2d 37, 43 (1956). ["Not only are the appellants here under the ordinary burden of persuasion in a civil case, but since they are seeking to impose a constructive trust . . . they must establish the oral agreement by *full, clear and convincing evidence* . . ."] (emphasis by court.)

Jacoby v. Shell Oil Co., 196 F. 2d 855, 858 (7th Cir. 1952). ["Proof to establish a constructive trust must be clearly convincing and so strong and unequivocal as to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon a theory other

than the existence of a trust, it is not sufficient to support a decree declaring and enforcing the trust."]

89 C.J.S. *Trusts,* §158 and cases collected;

Bogert, *op. cit.,* §472.

In the case at bar there are no findings of fact or convincing evidence which justify the impression of a trust.

First, there is no finding of any fraud, actual or constructive, on the part of the Bank, and there is no evidence of any such fraud. The Bank had no contact with Compania and made no representations to it. Insofar as the Bank's dealings with Kenray are concerned, there is no finding or evidence that the Bank represented that it would pay the charter-hire; on the contrary, the findings are clear that the Bank *declined* to obligate itself by the issuance of a letter of credit and that the only statement ever made by a Bank representative was that *Kenray* would have to pay the charter hire. [Stat. of Case, 1., 4. *supra*]

Second, there was no unjust enrichment to the Bank. Kenray was indebted to it for substantially more than was received from the Searaven cargo and the Bank has suffered a loss of more than $200,000.00, even if successful here. The antecedent indebtedness of Kenray was valid and *bona fide* consideration for the Bank's receipt of payment.

California Civil Code, §3106.[34]

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[34]Section 3106, in effect at the time of the Searaven's sailing, has been superseded by the California Commercial Code. Section 3106 provided in part "an antecedent or pre-existing debt constitutes value". Commercial Code, Section 1201 defines value as including total or partial satisfaction of a pre-existing claim. To

Smitton v. McCullough, 182 Cal. 530, 538 (1920) ["The rule that a transfer as security for a pre-existing debt is a transfer for value not only as between the parties but as to third persons as well is too well settled in this state to be questioned."]

We are not here concerned with voidable preference in the bankruptcy sense, but rather an alleged trust. As such, there clearly was value given to Kenray and there can be no claims that the Bank was unjustly enriched. Furthermore, even if there were such claims, maritime liens cannot be conferred upon a theory of unjust enrichment.

The Eurana, 1 F. 2d 684, 686 (3rd Cir. 1924) [Court stating: "A maritime lien . . . is *stricti juris* . . . Martime Liens, therefore, cannot be conferred on the theory of unjust enrichment or subrogation."]

The Aljohn, 7 F. Supp. 788, 790 (E.D. N.Y. 1934) ["A maritime lien, being secret and unrecorded, is *stricti juris,* and cannot be conferred on the theory of unjust enrichment or subrogation, and the right of such lien cannot be extended by judicial constructive analogy or reference."]

Third, there is no finding and no evidence of any confidential relationship or of any express trust. The Bank and Compania were both simply creditors of Kenray seeking to enforce their respective rights. We know of no case where the receipt of payment or the

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the same effect are Commercial Code §§ 3303, 3408. The Bank also gave new, as well as antecedent, consideration by advancing additional loans to fill out the Searaven cargo.

exercise of rights by one creditor was deemed to create a constructive trust in favor of another.

It is true, of course, that the Bank was protective of its creditor's position in obtaining the payment of the letters of credit. But, the fact that the Bank exercised an appropriate creditor's remedy and was more careful in protecting its rights does not confer any rights in Compania. "The law helps the vigilant, before those who sleep on their rights". [Calif. Civil Code §3527].[35]

Fourth, an analogous case demonstrating that no constructive trust may be imposed upon one creditor in favor of another creditor is *Zirker v. Baber,* 161 Cal. App. 2d 355 (1958). In *Zirker* it was held that the plaintiffs, who had loaned money to Baber, the proceeds of which were paid by Baber to a third person in satisfaction of a contractual obligation, could not recover from that third person upon a theory of trust or quasi-contract even though there may have been a failure of consideration in the transaction between Baber and the third person. The denial of recovery was upon the grounds that the relationship between plaintiffs and Baber was simply a loan and the extension of credit to Baber for his own purposes, that the third person was not a party to that transaction, that there was no privity between plaintiff and the third person, and that no trust relationship existed between the plaintiff and

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[35]Compania had innumerable ways to protect itself, i.e. Insisting on Kenray's prepayment of charter hire or the delivery by Kenray of satisfactory guarantees of payment; exercising a possessory lien on cargo; refusing to surrender the bills of lading until payment of charter hire was made; requiring that the letter of credit drafts be drawn in its favor; notifying the consignees of its claim for charter-hire before payment was made; or subsequently seeking relief under the Bankruptcy Act by attempting to set aside the payment to the Bank as a voidable preference. — It did none of these or any other acts to protect its position.

the third person. Similarly, in the case at bar, Compania extended credit to Kenray (by not requiring prepayment of the charter hire) and the Bank was concededly not a party to such credit transaction and had no privity or relationship to Compania. There is therefore no basis for any recovery by Compania from the Bank.

Another case demonstrating that a creditor-debtor relationship is insufficient to give rise to a constructive trust is *Woodruff v. Coleman*, 98 A. 2d 22 (D.C. 1953) in which it was held that a physician whose bill for services was unpaid could not impose a constructive trust upon the proceeds of a personal injury settlement received by his patient even though his bill was used in negotiating the settlement. The rational of *Woodruff* was that the physician had no direct right to obtain payment from the tortfeasor which paid the settlement and as a result the patient did not receive any money belonging to the physician.

The mere non-payment of debt is not a circumstance which creates a constructive trust [*McKey v. Paradise*, 299 U. S. 119, 122-123; 81 L. Ed. 75; 57 S. Ct. 124 (1936).[36] Similarly, the mere hope or expectation of a creditor that he will receive payment out of a particular fund will not create a trust. [1 Bogart, *Trust and Trustees* (2nd Ed.) §19, p. 129]. Therefore, the fact that Kenray may have been indebted to Compania

[36]In *McKey*, an employer made payroll deductions which it was required to pay to an employee's welfare association. It failed to make the payments and went into bankruptcy. The welfare association claimed preferential status upon a theory of constructive trust. The claim was not allowed and the court, while exercising sympathy for the employees, noted that the association (as Compania) was simply a creditor and that the "mere failure to pay a debt does not belong in that [constructive trust] category".

and Compania expected that it would be paid from the proceeds of the letters of credit, cannot justify the imposition of a constructive trust upon either the Bank or Kenray. Compania's sole remedy therefore is an action at law against Kenray.

Fifth, there was no evidence of any undue influence or mistake and no finding to that effect. The drafts against the foreign letters of credit were knowingly and intentionally drawn in favor of the Bank. No agreement was made by the Bank to apply the proceeds to the benefit of Compania and none may be judicially created. The Bank did not occupy a fiduciary relationship to Compania, with which it had no contact, and certainly did not do so to Kenray; nor did Kenray occupy a fiduciary position towards Compania. No confidential or fiduciary relationship exists between a creditor and a debtor or between parties who are merely under contractual obligations to each other. [*Waverly Productions, Inc. v. RKO General, Inc.*, 217 Cal. App. 2d 721, 732 (1963).[37]

The findings made by the trial court are devoid of any basis for the imposition of a constructive trust. Rather, it is clear that the basis of the court's decision is that it would be "inequitable" if the Bank could avoid payment of charter hire. That conclusion, however, adds nothing to the necessary legal analysis. There is no more inequity here than is present wherever one creditor is paid and another is not—wherever one creditor is preferred he receives the benefit of credit extended by others and there is nothing *per se* illegal or

[37]No one would seriously argue that an attachment by a creditor, thereby preferring himself over another, is the basis for a constructive trust. *A fortiori* a voluntary payment or assignment by a debtor to that creditor cannot sustain a trust.

wrong with a preference. We are not concerned here with an apportionment of assets or the avoidance of a preference such as would exist in a bankruptcy proceeding; rather we are concerned with the assertion of an *equity* claim and the fact that something would be fair or equitable does not mean that a cause of action exists. There must be an underlying cause of action and without such there can be no recovery regardless of the relative fairness of any result. Equity does not mean that the court, in a non-bankruptcy context, can redistribute money out of a sense of fairness without regard to the propriety of claims. As is said in 30 C.J.S. *Equity*, § 1, pp. 779-781:

> "While a court of equity is a forum for the administration of justice, 'equity' is not synonymous in meaning with 'justice' or 'natural justice' administrated without fixed rules, although the terms have sometimes been so used. On the contrary, equity is a separate but incomplete system of jurisprudence, administered side by side with the common law, having its own *fixed precedents and principles* now scarcely more elastic than those of the law . . . It is not [a court of equity's] function to assist in creating causes of action . . . *Equity may not and does not under the guise of doing equity create new substantive rights. . . .*"

Regardless of any sense of fairness, the court may not create a new right under the guise of being "equitable". The authorities, discussed above, are contrary to the decision here and the judgment may not be sustained.

IV.

Compania Waived Any Lien Claim It May Have Had and Is Estopped to Assert the Same.

We believe that we have conclusively demonstrated in the foregoing portions of this brief that Compania does not have any valid lien claim against the attached funds or respondent Bank. We further believe that even if a lien ever existed (which it did not) it was waived by the conduct of Compania which was incompatible with the assertion of any lien.

It is established that a maritime lien may be deemed waived by any conduct which is inconsistent with the assertion of a lien. [See *W. A. Marshall & Co. v. The President Arthur,* 279 U.S. 564, 568, 49 S. Ct. 420, 73 L. Ed. 846 (1929); 46 U.S.C.A .§974; 1 *Benedict* on Admiralty (6th Ed.), §89, p. 274.] We believe that the conduct of libelant here is to be deemed a waiver.

First, the Searaven bills of lading issued on behalf of Compania (by the ship's master who was Compania's agent) showed all freight to have been *prepaid.* Where bills of lading are marked "freight prepaid", the shipowner is precluded and estopped from asserting his lien for the unpaid freight owed. [See: The *Robin Gray,* 65 F. 2d 376 (2nd Cir. 1933) cert. den. 290 U.S. 653.] The *Robin Gray* case is significant since there it was held (65 F. 2d at 378) that the shipowner, by reason of the issuance of the prepaid bills of lading, was estopped to assert its lien not only as against the consignees, but also as against factors of the seller who had extended credit to the seller. Thus, the estoppel principle, which comes into play where prepaid bills of lading are issued, is equally applicable to an institution (such as respondent herein) which had extended credit

to the seller-charterer of the goods. The *Robin Gray* case precludes, upon principles of estoppel, the assertion by libelant of any lien herein. The *Robin Gray* decision also indicates that a reference to a charter party in a bill of lading is ineffective to preserve the shipowner's lien if the reference is inconsistent with the specific provision in the bill of lading indicating the freight to have been prepaid. [See also *Gilmore & Black, op. cit.* pp. 192-194.] Compania having issued the "freight prepaid" bills of lading, cannot now rely upon an attempted incorporation of the charter party into the bills of lading so as to preserve its alleged lien for unpaid charter hire.

Second, assuming as Compania argues that it did have a lien and is not estopped to assert it, Compania, both prior and subsequent to the filing of this action, *had actual possession of the cargo, which it voluntarily chose to relinquish.* In fact, some of the cargo was actually removed from the vessel and then reloaded by Compania after the default in payment by Kenray. [R. 221-222 (Find. 11); Rep. Tr. 132]. Had the cargo not been so released, Compania could have rendered this entire litigation moot by satisfying its claim from the cargo; or, at least, making a conditional delivery of the cargo, as was done in the *Jackie Hause,* [181 F. Supp. 165] a case now relied on by Compania. The inescapable fact is that Compania had ample opportunity to hold the cargo to satisfy its claim and chose not to do so. Having made that decision, Compania should not now be permitted to hold the Bank liable. Respondent Bank was not a party to the charter nor to the voyage of the Searaven—Compania was both. If Compania suffered a loss, it was due to its volitional release of

the cargo and not because of any act or breach on the part of respondent. The choice and decision to release the cargo was Compania's and respondent should not be penalized for that determination, however much Compania may now regret it.

Third, it is also significant that Compania did assert a lien against cargo for general average (but not for charter-hire) when the Searaven reached Taiwan, and that such lien was bonded against by the consignees [R. 221-222 (Find. 11); Rep. Tr. 134-135]. The fact that a lien was asserted only for general average demonstrates: (1) That Compania was aware of the waiver of any lien for unpaid charter hire by reason of its issuance of "freight prepaid" bills of lading; and (2) that the argument made below by Compania that the filing of this action was the equivalent of the assertion of a possessory lien is without merit, since the argument is inconsistent with the acknowledgment by Compania of the necessity for the assertion of a possessory lien against cargo for general average.[38]

In concluding that there had been no waiver, the District Judge relied upon the case of *Toro Shipping Corp. v. Bacon-McMillan Etc. Co.,* 364 F. 2d 928 (5th

[38]The ship's log disclosed that the captain desired to assert a lien for the unpaid freight as well as the general average for repairs made in Honolulu, but was instructed by Compania's agent to release the cargo upon delivery of the general average bond only. [Rep. Tr. 134-135, 125]. That instruction demonstrates that Compania was aware of its waiver of any possessory lien for unpaid charter hire by the issuance of the freight prepaid bills of lading. The lien for general average is co-extensive with that for charter hire, that is, a *possessory* lien upon cargo. [See: *Cutler v. Rae,* 48 U.S., 374, 376; 7 How. 729 (1848) quoted above in Part I of this brief.]

Cir. 1966). We submit that such reliance was misplaced. In *Toro* the court held that a shipowner had no lien on cargo where the consignee had prepaid the cost of the cargo to the charterer. The case therefore not only fails to support Compania, but on the contrary, is entirely consistent with the absence of any lien here. Compania argued below that since *Toro* held the shipowner's lien not to be operative as against a consignee who paid value, it must *per se* be operative against other persons. We submit that this is a most strained and unusual legal analysis and is unsupported by any authority. *Toro* dealt with a controversy between a shipowner and a consignee and the consignee prevailed. It does not follow from that holding that the shipowner should prevail here. The Bank also gave value. [See authorities Footnote 34, *supra.*] Furthermore, it is to be noted that *Toro* dealt only with the circumstances under which a shipowner could assert a valid lien against *cargo.* The statement in the decision that a lien on cargo may be reserved by appropriate bills of lading, except as against a good faith purchaser is therefore not relevant here since this case does not involve a lien asserted against cargo; in fact, Compania expressly declined to assert such a cargo lien; rather than an asserted lien on cargo, we are here dealing with claimed inchoate liens against intangibles; the fact that a lien may be reserved against cargo by so stating in the bills of lading, cannot be equated with a lien against subfreights, which lien fails upon payment thereof prior to the assertion of the lien.

V.

The Award of Interest Was Improper.

As we have demonstrated, there was no basis for the judgment of the District Court. The error below was further compounded by the award of interest to Compania. By arguing the propriety of the allowance of interest we do not concede the merits of any of Compania's claims. We do suggest, however, that the award of interest by the judgment below was improper even upon Compania's theory of the case.

Where an admiralty claim is in contract, an award of interest before judgment is proper. [3 *Benedict on Admiralty* (6th Ed.) §419]. In damage cases it is discretionary [id]. However, the claim here is neither in contract or for damages. The claim against the respondents other than Kenray is an *in rem* claim; therefore regardless of the amount of Kenray's *in personam* debt to Compania, the maximum recovery on the *in rem* claim can be only the amount of the *res*. That principle is no different than the principle applicable to the foreclosure of any common law or admiralty lien.

Under Compania's (and the District Court's) theory of the case the *res* here is the alleged subfreights of $96,750.00 which were "carved out" of the letter of credit and Purdy proceeds. Therefore, even if Compania were correct that such subfreights could be judicially created and that it has a viable lien thereon (i.e. that the lien was not discharged by payment of the subfreights before the lien was asserted or otherwise discharged), its maximum recovery from the attached funds or from any respondent (other than Kenray) is the amount of the *res*, $96,750.00, just as a mortgagee can recover from the mortgaged property no more than

its value, regardless of his total claim against the mortgagor.

This point can be further demonstrated by analogizing this case to an admiralty proceeding against a third party garnishee. In such a garnishee proceeding, the court determines the amount of the indebtedness (i.e. the *res*) owed by the garnishee to the defendant. The plaintiff is then entitled to recover from the garnishee no more than the amount of such indebtedness regardless of the amount owed by the defendant to the plaintiff and regardless of the amount actually placed under attachment.

The judgment here, under any theory, must limit the interest claim to the personal judgment against Kenray, and any recovery from the attached funds or respondent Bank can in no event exceed $96,750.00. We do not concede the propriety of any of Compania's claims. We submit, however, that even upon the basis of those claims there cannot be an award of interest.

Conclusion.

The judgment appealed from should be reversed with directions to the District Court to enter judgment in favor of respondent Bank and to order the release to respondent of the funds deposited in court pursuant to Admiralty Rule 37.

Respectfully submitted.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME L. GOLDBERG

No. 22694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS NATIONAL BANK, a national banking association,

Appellant,

vs.

COMPANIA DE NAVEGACIONE ALMIRANTE, S. A. PANAMA,

Appellee.

CLOSING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

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CLOSING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

Preliminary Statement.

First: In an effort to sustain a judgment which is contrary to law, Compania's answering brief unfairly suggests that the Bank is attempting to re-argue factual determinations. That assertion is without justification. That this appeal involves solely questions of law is clearly demonstrated by the Bank's statement of the case [*Op. Br.* pp. 6-10[1]]; that statement is based almost entirely upon the findings of the trial court and stipulated facts, and to the limited extent that evidence is referred to, it is that of Compania's

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[1]The "Opening Brief For Appellant Beverly Hills National Bank" is referred to by the abbreviation "*Op. Br.*"; the "Answering Brief of Appellee" is referred to as "*Ans. Br.*".

witnesses and exhibits.[2] Compania has not demonstrated any inaccuracy or insufficiency in the Bank's statement of the case and has accepted the statement in its entirety; to suggest, then, that the Bank is taking issue with findings of fact is particularly misleading.

An illustration of Compania's distortion of the nature of this appeal is found at pages 21-22 of its brief where it discusses the trial court's imposition of a constructive trust. After acknowledging the principle which we set forth in our opening brief that a constructive trust requires a finding of fraud, accident, mistake, undue influence or the violation of an express trust,[3] Compania asserts the Bank may not now reargue the propriety of findings supporting the conclusion that a constructive trust is to be imposed. That argument is entirely misleading for *there are no findings* of fraud, breach of an express trust or any of the other bases for the imposition of a constructive trust, and Compania has pointed to none. Our very point, discussed at length in our opening brief, is that the trial court's conclusions of law cannot be sustained by its findings of fact. For Compania to now suggest that we are rearguing factual determinations, in a case where there was no factual dispute, is misleading and improper.

Second: For the most part, Compania's brief is only an evasion of the main thrust of the arguments we have made. The brief refers to meaningless generalities concerning the preferred status of maritime liens and the

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[2]There was no conflict in the evidence. There were less than one hundred pages of actual testimony. The only witness called by the Bank was Theodore B. Roach who testified briefly on the issue of the stevedoring claim, a matter not involved on this appeal.

[3]See: *Op. Br.* pp. 52-59.

broad powers of a court of admiralty. It ignores, however, the crucial substantive questions involved here which are the nature of Compania's lien, what it can be asserted against, when it must be asserted and what events preclude the imposition of the lien. Take for example the question of the shipowner's (Compania's) possessory lien upon cargo. We contend, supported by Supreme Court decisions [*Op. Br.* pp. 14-23] that the lien is possessory only and does not attach to proceeds. The Supreme Court decisions have not even been mentioned by Compania, but instead the bold assertion is made by Compania that it did not have to retain possession of the cargo and that it had the unilateral "right to substitute securities"[4] by bringing this suit against the Bank. That assertion would vitiate an unbroken line of cases going back more than one hundred years. [E.g. *4885 Bags of Linseed* 66 U.S. 108, 113 (1861); *Cutler v Rae* 48 U.S. 374, 376 (1848)].

Another contention made by us is that to the extent that Compania had any lien of freights or subfreights (*i.e.* monies due Kenray for the shipment of cargo) the lien was valid only to the extent that it was asserted prior to the payment of those monies to Kenray or the Bank; the monies here were prepaid by the consignees and by Purdy and received by the Bank prior to the assertion of any lien by Compania and therefore Compania has no lien thereon. Our contentions in this regard are documented and supported by numerous au-

[4] *Ans. Br.* p. 14. In making this argument Compania continues to rely on *N.H. Shipping Corp. v. Freights of The S.S. Jackie Hause*, 181 F. Supp. 165 (S.D.N.Y. 1960), which as we pointed out in our opening brief involved a *consentual* substitution of non-prepaid freight monies for the cargo. *Jackie Hause*, in fact, expressly affirms the principle that the shipowner's lien is dependent upon possession.

thorities and text writers [*Op. Br.* pp. 34-37]. Compania, without analysis, responds to this contention by imperiously stating that the admiralty texts are wrong and that the cases were directed "solely to the rights and duties of the owner and shipper as against each other". That simply is not so. *In re North Atlantic and Gulf S.S. Co.* 204 F. Supp. 899 (S.D.N.Y. 1962) aff'd *sub nom Schilling v. A/SD/S Dannebrog* 320 F. 2d 628 (2d Cir. 1963) and to a lesser extent *Schirmer Stev. Co. Ltd. v Seaboard Stev. Corp.* 306 F. 2d 188 (9th Cir. 1962) indicate that had *creditors of the charterer* perfected valid attachments on the freight monies prior to the assertion of the shipowner's lien, the attachments would have priority. [*Op. Br.* pp. 38-39, 45-46]. *A fortiori,* the actual payment of the freights to the creditor has priority.[5]

Compania, while arguing generalities, has completely avoided any analysis of the nature of its claimed shipowner's lien. As we noted in our opening brief [*Op. Br.* p. 38] the theory of the shipowner's lien on unpaid freights is that it is contractually subrogated (under an appropriate lien clause of the charter agreement) to the charterer's rights to receive those unpaid freights; the shipowner is therefore in the same position as a mortgagee who is not in possession. However, once those freights are paid to the charterer of his successor, there no longer is anything to which the owner can

[5]This aspect of the cited cases is discussed at length in our opening brief [*Op. Br.* pp. 38-39, 43-44]. An interesting sidelight of *Schirmer* is that the attorneys for the attaching creditors were the same counsel now representing Compania. Those creditors in *Schirmer* made the same contention we now make, that the shipowner's lien is invalid as to freights or subfreights previously paid to or seized by a creditor of the charterer. [See discussion *Op. Br.* pp. 45-46].

be subrogated, and accordingly the lien falls. Despite the long history of the admiralty, there is no case where the shipowner's lien has been extended to a situation such as that present in the case at bar, that is, to freights which were already paid to the charterer or its successor; and Compania has cited no such case. The judgment below is unsupported by, and indeed contrary to, all existing authority and cannot be sustained.

Third: Although somewhat blurred by Compania's rhetoric, the basic issues here are relatively simply: (1) What is the scope of a shipowner's maritime lien; and (2) Is there legal justification for the imposition of a constructive trust. We have demonstrated conclusively that the maritime lien is limited to a right to retain possession of cargo or the right to receive subfreights[6] which have *not* been prepaid.—That, however, is not what Compania seeks to do here. With respect to the constructive trust argument there are no findings to support such a trust and Compania has not pointed to any evidence which would support such findings even if they were present.

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[6]As we noted in our opening brief [*Op. Br.* p. 25, footnote 15] and acknowledged by Compania [*Ans. Br.* p. 11, footnote 7] the words "subfreight" and "freight" are used interchangeably in the context of this case.

ARGUMENT.

I.

Compania's Possessory Lien Upon Cargo Was Lost Upon Surrender of the Cargo and Does Not Attach to Proceeds.

As noted above, Compania's brief does not question the authorities we previously cited [*Op. Br.* pp. 14-23] holding that a shipowner's lien upon cargo is exclusively possessory in nature and is lost upon surrender of the cargo. Compania argues, however, that by bringing this suit it was entitled to substitute the attached funds for the cargo, even though the funds had previously been paid to the Bank. In making that argument Compania relies entirely on *N. H. Shipping Corp. v. Freights of The Jackie Hause,* 181 F. Supp. 165 (S.D.N.Y. 1960).

We have previously discussed *Jackie Hause* at length [*Op. Br.* pp. 21-23, 41-42,] and will not now repeat that discussion. It is sufficient here to note that *Jackie Hause* involved a crucial fact situation not present in the case at bar. There, the owner and consignee had made a *contractual* substitution of the freight monies (which had not been prepaid) for the cargo *after* the lien on cargo was asserted. The issue was whether such consensual exchange precluded a lien upon the cargo or its substitute and the court held it did not.[7] *Jackie Hause* in no way changed, and in fact recognized, the rule that the shipowner's lien was exclusively possessory. In the case at bar we do not have a con-

[7]It is to be noted that in *Jackie Hause* the owner claimed a direct lien on the freight monies which were still in the hands of the consignee. The substitution therefore did not broaden the rights of the shipowner. Had those moneys been paid to a third person, or attached, however, the shipowner would have no right thereto. [*In re North Atlantic & Gulf S.S. Co., supra*].

sensual substitution. Furthermore, Compania, unlike the owner in *Jackie Hause,* is not seeking to assert a lien upon cargo or its agreed substitute, but is rather seeking to proceed independently against freights prepaid to the Bank.

Compania argues that it was not required to retain possession of the cargo until hire was paid. That argument is contrary to law. If Compania had a lien upon cargo it was *possessory;* the very nature of the possessory lien is that possession must be retained and once possession is relinquished the lien is lost. [See authorities *Op. Br.* pp. 15-17]. Compania did not have, as it suggests at page 14 of its brief, a right to substitute security, and *Jackie Hause* does not so hold. All *Jackie Hause* holds is that a *contractual* substitution of freights which had not been prepaid was not a relinquishment of possession. The "floating warehouse" language in *Jackie Hause* is simply to explain the agreed substitution and does not change the law that the shipowner's lien is possessory. To hold, as Compania argues and the District Court accepted, that the filing of a suit here and attachment of *previously paid* freights was the equivalent of a contractual substitution of *unpaid* freights is to expand beyond recognition the shipowner's possessory lien on cargo.

Compania argues that it could "trace" its lien and cites three decisions which it says supports the power of the trial court to trace. Those decisions are of no substantive value here. *The Surico* 42 F. 2d 935 (W.D. Wash. 1930) and *Bank of British North America v The Freights of Hutton and Ansgar* 137 Fed. 534 (2nd Cir. 1905) have previously been discussed by us. [See *Op. Br.* pp. 39-41]. Neither case involved a shipowner's lien; nor did either case really involve "tracing" since in

neither had funds passed into the hands of a third person not in privity with the agreement at issue. *Lathrop v Freights of the John Ena* 212 Fed. 560 (N.D. Cal. 1914) similarly does not support Compania's tracing theory. The *John Ena* was not a matter on the merits but simply related to an issue of whether the court should confirm an order for the deposit of funds into court pending the litigation. The opinion there refused to confirm the order in view of conflicting claims and simply deferred the matter for trial on the merits. The case therefore has no substantive relationship to the matter at bar. Furthermore, *John Ena* does not involve funds which had been paid to a third person (such as the Bank herein), but involved freights which had been collected by the shipowners. The issue in the case at bar is not the "power" to trace funds, but rather is there any lien which is of a nature that it can be traced. It is to that question that we answer no. Compania has not cited any case where a shipowner's lien was "traced" to the proceeds of cargo or to prepaid freights and cannot do so. The lien on cargo is exclusively possessory and the lien on freights falls as soon as the freights are paid. Therefore, there is no lien to trace and no case has ever attempted to do so.

Compania argues [*Ans. Br.* pp. 8-9] that a shipowner's lien is of first priority. That argument begs the issue here. The owner's lien has priority only to the extent that it is seasonably asserted against property susceptible to the lien—that is, against cargo or against subfreights which have not been prepaid. That is not what Compania seeks to do here. That the shipowner's lien is not of all-inclusive priority is demonstrated by the numerous decisions and texts considering and defining the scope of the owner's lien.

II.

Any Lien That Compania May Have Had Upon Subfreights Was Discharged Upon Payment of the Funds to Respondent Bank Prior to the Assertion of a Lien.

In a somewhat shotgun approach Compania argues that if it does not have a martime lien on the attached funds as "proceeds of cargo" it has one as "freights or subfreights".

First: In response to our preliminary argument that there were no indentifiable freights [See *Op. Br.* pp. 26-31], Compania points to the C.I.F. sales agreements and asserts that since freight was included in the price paid to Kenray, the trial court was justified in making the determination that there was freight of $96,-750.00 [*Ans. Br.* pp. 11-12]. We are unable to follow Compania's logic since if (as is undisputed) it is the *seller's* obligation to pay the freight in a C.I.F. contract, there would be nothing payable by the consignees and hence no identifiable freights.[8]

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[8]Compania also critcizes us for not inquiring of its witness concerning the subject of identifiable freights. [*Ans. Br.* pp. 11-12]. In this connection we note the following testimony found at page 47 of the Reporter's Transcript:

"BY MR. GOLDBERG:

"Q Mr. Coughlin, you told me that in negotiating the sale of the goods from Kenray to the consignees, that is, the goods that were shipped on the SEARAVEN, that sale was made CIF, cargo insurance, and freight.

"A. Yes.

"Q That sale was made upon a lump sum basis to the consignees?

"A. Yes.

"Q That is, the consignees paid a lump sum for the total cost of the goods.

"A Yes.

"Q Was there any allocation in that lump sum as between those three items?

"A No."

Second: In our opening brief we also argued that the subject charter party does not grant Compania a lien on freights [*Op. Br.* pp. 31-34]. In so doing we called the court's attention not only to the authority supporting our position, but also to the statements made in *N. H. Shipping Corp. v Freights of The Jackie Hause, supra,* 181 F. Supp. at 170 that a lien on cargo is a lien on freights and demonstrated why that statement was not controlling. [See: Op. Br. pp. 33-34]. Compania's response is to rely on *Jackie Hause.* Therefore, that issue requires no further discussion here.

Third: The crucial question here is whether Compania's asserted lien survives prepayment of the freights (*i.e.* payment to the Bank before Compania's lien was asserted) even assuming that such lien originally existed under the charter agreement and that there were identifiable freights. At pages 34-47 of our opening brief we demonstrate conclusively that the lien does not so survive and cite numerous authorities supporting the proposition that the owner's lien does not reach prepaid freights. Compania makes no answer to those authorities and cites no case where a shipowner was allowed to reach prepaid freights. The suggestion made by Compania [*Ans. Br.* pp. 16-17] that the rule only protects consignees against double payment is not correct. As we have already noted, both *In re North Atlantic & Gulf Steamship Co.*, 204 F. Supp. 899, 904 (S.D.N.Y. 1962) aff'd *sub nom Schilling v A/SD/S Dannebrog*, 320 F. 2d 628 (2nd Cir. 1963) and to some extent *Schirmer Stev. Co. Ltd. v. Seaboard Stev. Corp.*, 306 F. 2d 188 (9th Cir. 1962) discuss the principle in the context of a shipowner versus a creditor of the charterer. Once the freights are paid, the lien

falls and there is no lien to assert [See, *Op. Br.* pp. 36-47].

Compania attempts [*Ans. Br.* p. 17] to dispose of the recognized text writers who support the Bank's position by cavalierly stating they are wrong and contrary to authority.[9] However, Compania has cited *no case* where a shipowner was allowed to assert a lien against prepaid freights regardless of the alignment of the parties or who had possession of the funds. The cases cited at page 9 of Compania's brief, with the exception of *The Solhaug* 2 F. Supp. 294 (S.D.N.Y. 1931) are discussed in our opening brief. [Op. Br. pp. 35, 38, 41-44]. None of them involved prepaid freights. *Solhaug* is consistent with the Bank's position. There, a shipowner sought to impose a lien on the unpaid portion of subfreights still held by a consignee of a sugar shipment; the issues were whether the *consignee* was entitled to credit for certain advances made by it and for certain sums paid to the charterer and whether those sums were paid prior to the consignee's notice of the shipowner's claim. *Solhaug* did not involve, as here, a shipowner's claim of lien upon freights previously paid to and in the possession of a third party.

The citation of Gilmore & Black *The Law of Admiralty,* p. 517, note 103 at page 9 of the answering brief supports the Bank. There the authors, in discussing *American Steel Barge Co. v Chesapeake & Ohio Coal Agency* 115 F. 669 (1st Cir. 1902) and other cases, note

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[9]It is to be noted that Compania takes issue with *Poor on Charter Parties* and *Stephens on Freights.* Its brief is silent, however, with respect to our citation of Gilmore & Black *The Law of Admiralty* which is a text cited by Compania for other purposes. Gilmore & Black are in complete accord with Stephens and Poor. [See quotation, *Op. Br.* p. 36]. Compania itself cites Poor as a recognized authority. [*Ans. Br.* p. 14, footnote 9].

that a shipowner has no lien on freight without a specific clause in the charter party [See *Op. Br.* pp. 31-34] and that if there is such a clause the shipowner may enforce the lien "against any freight remaining *unpaid*". (Emphasis ours). [See *Op. Br.* pp. 34-39].

Compania refers to the Bank as being in the "shoes of Kenray". That is of course not true. The Bank as a creditor of Kenray is no more in its shoes than is Compania which was also a creditor. Furthermore, even if the assertion were correct, it would add nothing to the analysis here since the lien is lost as to prepaid freights even if paid to the charterer. [See authorities *Op. Br.* pp. 35-36]. The "third person" referred to at page 16 of Compania's brief must be the consignee or shipper, and if the subfreights have left the hands of the consignee or shipper and been paid to the charterer or his successor, the owner has no lien thereon. Compania would have no lien upon the prepaid freights even if they still remained in the hands of Kenray and had not been paid to the Bank. The fact that Compania exercised a provisional remedy and caused the funds to be attached does not mean that it has any substantive right thereto.

It is the Bank's position that Compania's lien does not reach prepaid freights, that is, the monies received by the Bank prior to the assertion of any claim by Compania. The correctness of this position is demonstrated by a comparison of *Jackie Hause, supra,* relied

upon by Compania with *In re North Atlantic & Gulf S.S. Co., supra,* which we cited in our opening brief. In *Jackie Hause* the court characterized the issue as follows:

> "We have to determine the ownership of *uncollected freights* admittedly due on a transocean cargo of corn . . ." [181 F. Supp. at 167]. (Emphasis ours.)

In the case at bar we are not dealing with *uncollected* freights, but rather with freights *prepaid* prior to the assertion of any lien. Compania's claim in the instant matter is therefore governed by the following rule articulated *In re North Atlantic & Gulf S.S. Co., supra,* 204 F. Supp. at 904 as follows:

> "The shipowner's lien on subfreights permits him to obtain payment of monies due under the charter out of such subfreights earned by the vessel as remain *unpaid* by a shipper to the charterer (authority) . . . If the cargo is delivered and the shipper pays the subfreights to the charterer in good faith, *the shipowner's lien falls* (authority)." (Emphasis ours.)

And in *Stephens on Freight,* p. 200:

> "But such a lien can only be exercised before the subfreight has been paid to the charterer of the ship or his agent. The *lien confers no right on the shipowner to follow the subfreight after it has been paid.*" (Emphasis ours.)

In conclusion, then, the judgment cannot be sustained on the theory that the attached monies are subfreights or freights upon which Compania has a lien.

III.

The District Court Had No Jurisdiction or Substantive Basis for the Imposition of a Constructive Trust.

A. The District Court Sitting in Admiralty Had No Jurisdiction to Consider an Independent Equitable Claim.

In response to our argument [*Op. Br.* pp. 48-52] that the District Court improperly exercised jurisdiction over an independent equitable claim, Compania cites, at page 7 of its brief, authorities dealing with quasi-contractual claims.[10] Those cases have no application here. They did not involve asserted trusts but rather were situations where there had been overpayment of charter hire [*Sword Line Inc. v United States* 228 F. 2d 344 (2nd Cir. 1955) aff'd. 230 F. 2d 75, aff'd. 351 U.S. 976 (1956)], failure of consideration in a contract of passage [*Archawski v Hanioti* 350 U.S. 532 (1956)], excessive freight charges [*Krauss Bros. Lumber Co. v Dimon S.S. Corp.* 290 U.S. 117 (1933)] and a seamen's claim for maintenance and cure (disability coverage) against the owner of his ship. [*Vaughan v Atkinson* 369 U.S. 527 (1962)].

International Refugee Organization v Maryland Drydock Co. 179 F. 2d 284 (4th Cir. 1950), also cited by Compania, was an attempt by parties advancing monies to an owner of a ship to impose a constructive trust upon the vessel so as to maintain priority over the lien of one making repairs to that vessel. The court de-

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[10]Compania suggests in a footnote [*Ans. Br.* p. 5] that the jurisdictional argument is moot because the trial court could have exercised diversity jurisdiction had it been asked to do so. The answer to this contention is simply that the court was *not* asked to do so. The objection to jurisdiction was made well in advance of trial. [See, Pretrial Order p. 9, R. 181].

clined to impose such a trust. *Van Camp Sea Food Co. v Di Leva* 171 F. 2d 454 (9th Cir. 1948) referred to by Compania had nothing to do with constructive trusts and in fact supports the Bank's position here. In that case, which was a libel for loss of earnings due to a collision, this court recognized the distinction between an admiralty court's proceeding on equitable principles and exercising jurisdiction over an independent equitable claim. In *Gayner v The New Orleans,* 54 F. Supp. 25 (N.D. Cal. 1944) the issue was whether discharged ferryboat employees could impose a lien upon a vessel for termination benefits; the case has no relationship to the jurisdictional issue present here. Similarly *Compania Anoima Venezolana De Navegacion v A. J. Perez Export Co.* 303 F. 2d 692 (5th Cir. 1962) has no application here despite what Compania refers to as a "colorful opinion". The issue in *Perez* was not one of jurisdiction but simply whether a berth agent, as the subrogee of a carrier, was entitled to collect freight charges from a shipper where the shipper had previously paid a freight forwarder who in turn failed to pay the carrier or the agent.

1 Benedict, *Admiralty* §71 (6th Ed. 1940) cited by Compania, recognizes that "the court of admiralty is not a court of general equity nor has it the characteristic powers of a court of equity. Admiralty does not take cognizance of specific performance or of trusts . . .".

Compania's attempted distinction of the *Bay Belle* case[11] (in which it was expressly held that admiralty

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[11]*Port Welcome Cruises, Inc. v S.S. Bay Belle* 215 F. Supp. 72, 84-85 (D.C. Md. 1963), aff'd *sub nom Humble Oil & Refining Co. v S.S. Bay Belle* 324 F. 2d 954 (4th Cir. 1963).

had no jurisdiction to impose a constructive trust) is most unique and involves a classic bootstrap approach. Compania argues in *Bay Belle* the *res* was not before the court whereas in the case at bar the *res* was before the court below [*Ans. Br.* p. 8]. What Compania ignores is that the *res* here was before the court only because the District Court chose to exercise jurisdiction over it, in direct contravention of the historical limitations of its admiralty jurisdiction, whereas in *Bay Belle* there was no *res* before the court because the trial judge properly concluded that he could not exercise jurisdiction. The attempted distinction, therefore, is merely a restatement of the result reached by the trial court.

In short, Compania has cited no case, and there are none, where an admiralty court has impressed a constructive trust. The exercise of jurisdiction cannot be sustained.

B. There Is No Substantive Basis For the Imposition of a Constructive Trust.

As noted in our Preliminary Statement, *supra,* Compania attempts to make it appear that we are re-arguing findings of fact supporting the imposition of a constructive trust. Such is not the case. What we are arguing is that there are no findings which justify the imposition of a trust [*Op. Br.* pp. 52-59].

Compania argues [*Ans. Br.* p. 22] that the constructive trust can be supported on three bases: constructive fraud, a breach of a confidential relationship between Kenray and the Bank, and unjust enrichment. These assertions dissolve upon analysis.

First, there was no finding of constructive fraud by the trial court and Compania has not pointed to any finding or evidence of the same. [See *Op. Br.* p. 54]. Compania has cited no authority to support its bold assertion that the Bank's conduct here constitutes constructive fraud,[12] nor has it pointed to any evidence which supports a finding of such fraud even if such finding had been made.

Second, there is no finding by the trial court of a confidential relationship between Kenray and the Bank and there could be none since their relationship was that of a creditor and debtor. [See *Op. Br.* p. 58]. Furthermore, even if there were such a relationship between *Kenray* and the Bank, that could not create any right in Compania with which the Bank had no contact. Again, no authority is cited to support the assertion that a confidential relationship exists, and Compania has not pointed to any finding or evidence of the same.

Third, the Bank gave legal value and was not unjustly enriched; there is no finding of unjust enrichment and Compania has not and cannot show how or in what manner the Bank has been unjustly enriched. [See discussion *Op. Br.* pp. 54-55]. The funds received by the Bank were applied upon a bona fide debt of Kenray. If Kenray's debt to the Bank was not value, then similarly its debt to Compania was not value. Furthermore, even if the Bank were unjustly enriched, it is only Kenray (which paid the Bank) and not Compania that

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[12]Compania cites *Scott on Trusts* and other authorities for generalized statements as to when a constructive trust may arise (*i.e.* fraud, undue influence, breach of an express trust or confidential relationship, etc.). Those citations add nothing to the analysis of whether a legal predicate for the imposition of a constructive trust is present here.

may be heard to complain. The case of *Northwest Marine Works v United States* 307 F. 2d 537 (9th Cir. 1962) cited by Compania in its conclusion has no factual similarity to the case at bar nor does it have any relationship to the legal issues present here. That case simply held that existing maritime liens (for materials and supplies) had priority over a claim of the United States Maritime Administration (as mortgagee) for advances made while the vessel was operating under an informal receivership which was ultimately held to be improper.

As we clearly demonstrated in our opening brief the record here is devoid of any legal basis or justification for the impression of a constructive trust. This is not a bankruptcy case. The preference of one creditor cannot create a trust in favor of another. Compania has pointed to no evidence or findings which support the District Court's conclusions sustaining an equitable cause of action in its favor.

IV.

Compania Is Barred by Principles of Waiver and Estoppel.

In response to our argument that its issuance of "freight prepaid" bills of lading and its other conduct estops Compania from asserting any lien [*Op. Br.* pp. 60-65] Compania asserts that the Bank "gave no consideration" for the bills of lading and drafts. In making this argument Compania assumes that Kenray's debt arising from the prior extension of credit is not value. That assumption is not supported by any citation of authority and in fact is directly contrary to law.[13]

[13]See authorities, *Op. Br.* pp. 54-55 holding that an antecedent indebtedness constitutes value.

Furthermore, if the Bank's antecedent debt was not value, then Compania also gave no value for it too extended credit to Kenray by deferring the time for payment of the charter-hire and now seeks to impress a lien for the collection of an antecedent debt.

Conclusion.

An affirmance of the judgment here would create new rights where none existed previously; it would overrule an unbroken line of authority; and it would expand the scope of a shipowner's remedies beyond that ever recognized by a court of admiralty. The ingenuity of Compania's counsel cannot circumvent contrary authority or create legal rights where none exist. Accordingly the judgment should be reversed with directions to the District Court to enter judgment in favor of Beverly Hills National Bank.

Respectfully submitted,

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LOEB AND LOEB
Of Counsel.

Certificate.

I certify that in connection with the preparation of this brief I have examined the Federal Rules of Appellate Procedure and the Rules of The United States Court of Appeals For The Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME L. GOLDBERG,

No. 22694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS NATIONAL BANK, a national banking association,

Appellant,

vs.

COMPANIA DE NAVEGACIONE ALMIRANTE, S.A. PANAMA,

Appellee.

ANSWERING BRIEF OF APPELLEE

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ANSWERING BRIEF OF APPELLEE

I

INTRODUCTION AND SUMMARY OF THE CASE

It seems typical of arguments on appeal that the appellant must urge error in law and then take issue with the trial court's findings of fact. This case is no different. To a considerable extent, the Bank's[1] argument is one addressed to the trier of fact and is, to that extent, controlled by the rule of *McAllister v. United States* (1954) 348 U.S. 19. Without extending the length of this brief unduly, Compania can point to the following — all matters of fact — which limit and indeed undercut the predicate of the Bank's position:

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[1]Appellee will adopt the style used in the trial court and by appellant here: it will call itself "Compania" and appellant "the Bank".

1. Three defendants were before the trial court: the *in rem* respondent[2] "Proceeds", found to be within the court's jurisdiction [F. 19; R. 224]; the charterer Kenray, Inc., whose default was eventually entered [R. 170-71]; and the Bank.

2. Despite its claim in the court below, and by implication here, that this suit has never *really* been against it, the Bank was a named party in the original libel [R.2], which it answered for itself [R. 161]. The Bank was confronted squarely with the issue of its own liability in the pretrial conference order [Issues 14, 16, 19; R. 181-82] and was held severally liable for the full amount of the judgment [Concl. 11, 12; R. 228].

3. Although the court found that the bank was not a party to the charter of the SEARAVEN, it did *not* find the Bank was ignorant of the transaction. Indeed, the voyage was instigated by the Bank in an effort to liquidate its position in Kenray, a position which had resulted from a series of unprofitable scrap voyages and which reached a gross indebtedness the prior May in excess of $2,000,000 [R.T. 94]. The Bank knew and approved of the charter fixture [R. 220, 225]. It readily acceded to the suggestion that no letter of credit be offered as security for the SEARAVEN hire, *not* in the course of denying its intention to provide for the hire but so that no additional indebtedness would appear on its own books [F. 7, R. 220] — the SEARAVEN'S voyage was for its benefit [F. 26, R. 225].

4. The Bank makes no assertion that its right to the more than $500,000 it collected stands on maritime law. It is thus a non-admiralty claimant in an admiralty court. To the extent Compania's claim of maritime right is sustained, the Bank necessarily loses. Gilmore & Black, *Admiralty* 641 (1957).

[2]So styled under the admiralty practice prevailing in 1964 when suit was filed.

II

ISSUES PRESENTED

The following are the questions raised by this appeal:

1. Does an admiralty court, properly vested with jurisdiction of the subject matter and the parties, have jurisdiction to grant equitable relief?

2. Does an admiralty court have the *power,* and a maritime lienholder the *right,* to follow property into the hands of third persons in order to enforce the lien asserted?

3. To what extent can one who did *not* act in reliance on a shipowner's conduct or on statements in bills of lading issued by the shipowner claim an estoppel arising from the conduct and the statements?

4. Was the evidence before the trial court sufficient to justify the court's finding that appellant was constructive trustee of designated funds for the benefit of appellee?

5. Did the trial court have power to award prejudgment interest?

III

SUMMARY OF ARGUMENT

This case involves two principal points: enforcement of a maritime lien for unpaid charter hire and imposition of a constructive trust, the result of unjust enrichment. In seeking to enforce its maritime lien for unpaid hire, appellee Compania found monies within the trial court's jurisdiction, clearly identifiable as the proceeds of cargo,

freights and subfreights of SEARAVEN. These it seized under process *in rem*. These were ordered into court at a time when cargo represented by the proceeds was still in the vessel's possession. Viewing the fund as proceeds in part of cargo, the lower court correctly concluded there had been no unconditional release of the cargo itself until *after* the shipowner's lien was exercised. Viewing the fund as proceeds in part of freights, the lower court correctly concluded Compania was entitled to follow such monies beyond the hands of the consignees. Inasmuch as the Bank had full knowledge of the facts and circumstances of the voyage — and gave *no* value in exchange for the bills — it was not entitled to raise the equitable arguments of waiver and estoppel running in favor of a bona fide purchaser.

The constructive trust argument is essentially a factual one, as to which the court's findings are not contradicted by anything in the record. The court below properly found appellant would have been unjustly enriched had it not paid the hire earned by carriage of the scrap cargo for its benefit.

IV

THE TRIAL COURT PROPERLY EXERCISED ITS ADMIRALTY JURISDICTION

At the threshold of this appeal are two jurisdictional questions: Does an admiralty court have the power to trace funds beyond the hands of the payor? Does an admiralty court have the power to determine equitable questions presented in the course of deciding a controversy properly before it?

To both of these questions the Bank would answer no. The Bank is wrong.

1. The question of tracing is most easily dealt with. It is implicit in the Bank's argument that an admiralty court is powerless to determine rights in a fund once that fund has passed to a third person. No case is cited in the opening brief in support of such an argument. In dealing with the "tracing" cases the Bank asserts only factual distinctions and does not deal with the judicial *power* being exercised. It is perfectly clear in terms of such power that an admiralty court now is, and always has been, competent to trace monies through successive hands *so long as* the monies could be identified. *Lathrop vs. Freights of The JOHN ENA* (N.D.Cal. 1914) 212 Fed. 560; *Bank of British North America vs. Freights, etc., of The HUTTON* (2d Cir. 1905) 137 Fed. 534; The *SURICO* (W.D.Wash. 1930) 42 F.2d 935.

Here there is no doubt that the respondent "Proceeds"[3] constituted an identifiable corpus within the geographical jurisdiction of the court [F. 15, 19; Concl. 2; R. 223, 224, 226]. The narrow question remaining is a matter of priorities [discussed in section V, *infra*]. At this point it need only be recognized that the court below had clear jurisdiction over the *in rem* respondent.

2. The Bank likewise urges upon this Court the proposition that the trial court was powerless to pass on the equitable questions presented it.[4] Placing principal re-

[3]The entire proceeds $535,371.21 were ordered into court under the court's order to show cause and order denying exceptions [R. 755]. The parties subsequently stipulated to substitute deposit of $145,000 [R. 59, 184], which is more than the amount here in issue.

[4]In a sense this argument is moot. The record shows that the trial court could have exercised diversity jurisdiction had it been asked to do so. Transfer to the law side [for trial without jury of the equitable issues presented] would have been the only result of a finding by the court that it lacked admiralty jurisdiction on these issues.

liance on its interpretation of *Putnam vs. Lower* (9th Cir. 1956) 236 F.2d 561. The Bank contends in essence that, because the non-lien elements of this suit *could possibly* have formed the subject of a separate suit, they necessarily *must* be litigated separately. *Putnam* does not so hold: this court actually sustained a finding of jurisdiction. The following is part of the excerpt quoted by the Bank:

> "[H]aving once secured jurisdiction as an admiralty court, they [admiralty courts] may proceed in the trial of the cause on equitable principals." *Id.* at 568.

The Bank goes on to quote with approval the language of Judge Learned Hand speaking for the Second Circuit as follows:

> "That jurisdiction depends in our judgment altogether upon the cause of suit which the libelant brings before the court; if that be once maritime, the court may dispose of it completely without the need of any other suit in the same, or any other court; it is omnicompetent within its sphere."
>
> *Rice vs. Charles Dreifus Co.* (2d Cir. 1938) 96 F.2d 80, 83.

Putnam then states in conclusion:

> "Accordingly, where the original jurisdiction is maritime, a court of admiralty may entertain an issue of fraud, mistake, or other equitable claim, where either is alleged as affecting the rights of parties to a maritime action." 236 F.2d at 569.

The cases approving exercise of equitable powers by an admiralty court are myriad. Prominent among them are *Swift & Company Packers vs. Compania Colombiana del Caribe, S.A.* (1950) 339 U.S. 684, which the Bank apparently seeks to limit. Others include the following:

Archawski vs. Hanioti (1956) 350 U.S. 532 [action for restitution, following breach of a contract of passage, approved];

Sword Line, Inc. vs. United States (2d Cir. 1955) 228 F.2d 344, *aff'd on rehearing* (1956) 230 F.2d 75; *aff'd* (1956) 351 U.S. 976 [action to recover overpayment of hire, affirmed];

See also:

Gilmore & Black, *Admiralty* 26 n. 94:

> "[T]here is no warrant in history, venerable precedent, principle, or common sense for denying to the admiralty courts jurisdiction over the quasi-contractual claims. If the court is set up as the special industrial court of the shipping business, then obviously its expertness is just as much needed when the theory of action happens to be *quasi ex contractu* as at any other time."

Chandler, *"Quasi-Contractual Relief In Admiralty"*, 27 Mich. Law Rev. 23 (1928);

Comment, *"Present Status Of Quasi-Contractual Relief In Admiralty"*, 23 Calif. L. Rev. 343 (1935);

1 Benedict, *Admiralty* § 71 (6th ed. 1940);

Vaughan vs. Atkinson, 369 U.S. 528;

Krauss Bros. Lumber Co. vs. Dimon S.S. Corp. (1933) 290 U.S. 117;

International Refugee Organization vs. Maryland Drydock Co. (4th Cir. 1950) 179 F.2d 284, 287;

Van Camp Sea Food Co. vs. Dileva (9th Cir. 1948) 171 F.2d 454;

Gayner vs. The NEW ORLEANS (N.D. Cal. 1944) 54 F.Supp. 25, 28.

The BAY BELLE [*Port Welcome Cruises, Inc. vs. The BAY BELLE* (D.Md. 1963) 215 F.Supp. 72; *aff'd sub nom. Humble Oil & Ref. Co. vs. S.S. BAY BELLE* (4th Cir. 1963) 324 F.2d 954] can be readily distinguished from this case. The court there was asked to exercise its jurisdiction over a *res* not before it. As already pointed out, the *res* here was indisputably and quite properly before the court below. A decision not to *extend* physical jurisdiction to a *new res* is no authority for denying the capacity of a court which *already* has jurisdiction over the *res* in question to decide rights in that *res*.

As Judge Brown said in a typically colorful opinion speaking for the Fifth Circuit:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."
>
> *Compania Anonima Venezolana de Navegacion vs. A. J. Perez Export Co.* (5th Cir. 1962) 303 F.2d 692, 699.

V

THE TRIAL COURT PROPERLY ALLOWED COMPANIA TO ENFORCE ITS LIEN AGAINST THE FUNDS IN THE HANDS OF THE BANK.

The Bank likewise misconceives the nature of the lien which Compania seeks to enforce. It is, of course, basic law that a shipowner's lien for its hire is a *first priority* as against other maritime claimants. Numerous cases so hold; among them are:

Freights of The KATE (S.D. N.Y. 1894) 63 Fed. 707;

American Steel Barge Co. vs. Chesapeake & O. Coal Agency Co. (1st Cir. 1902) 115 Fed. 669;

The SOLHAUG (S.D. N.Y. 1931) 2 F. Supp. 294;

N. H. Shipping Corp. vs. Freights of The JACKIE HAUSE (S.D. N.Y. 1960) 181 F. Supp. 165;

American Smelting & Ref. Co. vs. Naviera Andes Peruana, S.A. (N.D. Cal. 1962) 208 F. Supp. 164; *aff'd sub nom. San Rafael Compania Naviera, S.A. vs. American Smelting & Ref. Co.* (9th Cir. 1964) 327 F.2d 581;

Luckenbach Overseas Corp. vs. The Sub-freights of The AUDREY J. LUCKENBACH (S.D. N.Y. 1963) 232 F. Supp. 572.

See also:

Gilmore & Black, *Admiralty* 517 (and cases collected at note 103);

Robinson, *Admiralty* 401-4.

The Bank attempts to distinguish these cases factually, but it offers no authority to denigrate Compania's prior right. The unquestioned recognition of this right makes irrelevant the reliance placed upon such cases as *Osaka Shosen Kaisha vs. Pacific Export Lumber Co.* (1923) 260 U.S. 490, and *Galban Lobo Trading Company S/A vs. Diponegaro* (S.D. N.Y. 1951) 103 F. Supp. 452. In each of these cases the alleged "lienor" sought to impose a maritime lien on a vessel for breach of contract to carry cargo. Both courts held such a lien had never existed: that the claimant had *no right at all.*

Turn then to the nature of the lien which Compania asserts. Paragraph 8 of the charter party [Exh. 1] reads as follows:

> "Owners shall have a lien on the cargo for freight, dead freight, demurrage . . ."

So far as Compania is aware, only one reported case has determined the extent of the *res* reached by this language. In *The JACKIE HAUSE* [*N.H. Shipping Corp. vs. Freights of The JACKIE HAUSE* (S.D. N.Y. 1960) 181 F. Supp. 165] the charter party before the court was reported to contain this language:

> "6. 'Vessel to have a lien on the cargo for all freight, dead freight, demurrage or average' ". 181 F. Supp. at 168.

The court specifically held that this lien clause gave the shipowner a lien, not only on the cargo, but also on the freight earned by the cargo. In doing so, the court said:

> "Much is attempted to be made by Stratford of the fact that N.H. Shipping Corp's lien is claimed now against 'freights' while the charter party reserved a lien on 'cargo' only but while this might be significant under other circumstances and under another charter party it is not here, for the 'freight' earned by the cargo represent (exclusive of commissions) the sum to be paid for the use of the ship and a lien on cargo when the vessel has not been paid its hire is a lien on the sum earned by the cargo." 181 F. Supp. at 170.

Accord: *Jebsen vs. A Cargo of Hemp* (D. Mass. 1915) 228 Fed. 143.

The Bank's argument that *The JACKIE HAUSE* is contrary to other recognized authority is incorrect. None of the cases it cites deal directly or indirectly with the quoted language. Each in fact *upheld* the shipowner's claim of lien on the strength of language in the charter party [e.g. *In re North Atlantic and Gulf S.S. Co.* (S.D.

N.Y. 1962) 204 F. Supp. 899].[5] Such cases, as well as textual authority relied on, are inapposite to the problem of interpreting language which does appear in the charter party now before this Court.[6]

It follows then that the charter party lien extends both to the cargo and to the "sum earned" by that cargo, i.e., the freights.[7] The next question is: *were* there any freights to which the shipowner's lien could attach? The Bank contends there were not, that none of the funds received were "clearly identifiable as subfreights". This argument (a factual one) is untenable. The sales documents are part of the record [Exh. 4 A-I]. They show a series of CIF sales. Robert Coughlin, vice president of Kenray, testified at trial that such a sale meant the buyer paid cost, insurance, and *freight,* and that *freight* was indeed part of the price [R.T. 45-46]. Had the Bank been serious in its present contention that "Kenray, in order to make the total deal, was itself absorbing the cost

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[5]*A/S Dampsk. Thorbjorn vs. Harrison & Co.* (S.D. N.Y. 1918) 260 Fed. 287 is an exception: the Bank has miscited it for the proposition put forward. The case in fact turns on good-faith payment by a subcharterer *before* receipt of the owner's notice of lien.

[6]The Bank's attempt to distinguish *The JACKIE HAUSE* factually on the basis of parity between the shipowner and consignee is likewise immaterial at this point: obviously, if the shipowner had a *contractual* right to the freight money, it would not need to resort to any lien right.

[7]The Bank consistently refers to the lien as being asserted against "subfreights". Analytically speaking, the lien was asserted against "freights" since the payment by charterer to shipowner was "hire" not "freight". This distinction should not affect analysis of the cited cases. The characteristic of the *res* is the same (i.e., payment for carriage by a stranger to the vessel) whether called subfreights as the Bank would or freights as the court did [F. 20; R. 224].

of the freight" [Op.Br. 28] it had the witness available to answer. It chose not to. The court's finding that there was freight and that its reasonable amount was $96,750 is not contested by any evidence the Bank offered.

Moreover, the Bank misses the point on the quasi-freight cases [*Whitney vs. Tibbol* (9th Cir. 1899) 93 Fed. 686; *Poland vs. The SPARTA* (D.Me. 1828) 19 Fed. Cas. 912 (No. 11,246); *Clifford vs. Merritt-Chapman & Scott Corp.* (5th Cir. 1932) 57 F.2d 1021; *Vlavianos vs. The CYPRUS* (4th Cir. 1948) 171 F.2d 435]. These were cited below to demonstrate the *power* of the trial court to carve out reasonable freights if it concluded none had been earned. The seaman's lien on freight money derives from the vessel's by *subrogation in law*. Hence the *power* to determine freights exists in the case at bar. Compania argued, and the court agreed, that the funds received by the Bank did indeed include freight monies. But the court chose, *in addition,* to exercise its power on the alternate assumption that no freights had been earned. Nothing the Bank presents shows this exercise was unreasonable.

This, in brief, is Compania's position: that its lien extends both to cargo and to the earnings of cargo, i.e., freights; and that, as the court found, there were indeed such freights earned by the cargo of SEARAVEN. The sole remaining question is whether Compania properly exercised its lien against cargo or against freights or both. In urging that it did not, the Bank sets out several propositions to which we now turn.

(a) The Bank first urges that delivery of the scrap cargo at Taiwan was so unconditional as to constitute waiver of Compania's lien. The court found that it was not [F. 224; R. 225]. Compania had in fact commenced suit, seized funds in the Bank's hands, and procured the

court's order for deposit [R. 7, 55] before *any* cargo was released to the consignees. Although the Bank purports to distinguish *The JACKIE HAUSE, supra,* it actually makes the same argument which was rejected there:

> "To say that the 'Jackie Hause' had no choice but to sit in a foreign port with the cargo in its hold or in a warehouse at its risk in order to protect its lien, disregards law and commonsense. The delivery of the cargo by N.H. Shipping Corp. did not effect that absolute and unconditional change of possession to the consignee sufficient to extinguish the vessel's lien for payment of its charter hire." 181 F. Supp. at 171 [citing *The MT. SHASTA,* 274 U.S. 466; *THE BIRD OF PARADISE,* 72 U.S. 545; *The VOLUNTEER,* 28 Fed. Cas. 1260 (No. 16991) (D.Mass. 1834); *McBrier vs. A Cargo of Hard Coal,* 69 Fed. 469 (D.Minn.); *Bank of British North America vs. The Freights of The HUTTON* (2d Cir.) 137 Fed. 534.]

The *Portland Flouring* case [*Portland Flouring Mills Co. vs. Portland & Asiatic S.S. Co.* (D. Ore. 1906) 145 Fed. 687) does not present the issue asserted by the Bank, nor is it dispositive on this point. The target respondent was the cargo underwriter, who obtained the proceeds of a salvage sale *after* the shipowner had abandoned both vessel and cargo to underwriters. The court *held* [at 694] that abandonment constituted a *waiver* of the shipowner's lien. No salvage proceeds existed until a point in time *after* the abandonment/waiver had occurred. If anything relevant is to be gained from the case and the language quoted[8] by the Bank, it is the negative inference

[8]"The lien being lost, the alleged fact, which must be taken as true, that the proceeds of the salved flour came into the Yokohama Specie Bank to the joint credit of the agents of the Portland & Asiatic and the assurance company, could not be effective to restore it, so that there is no lien upon such proceeds, into whosesoever hands they have come." 145 Fed. at 694.

that the shipowner's lien, as asserted by libelant, *would have* attached to the proceeds had the shipowner *not* waived it beforehand.

What the Bank urges is that SEARAVEN had no choice but to retain physical possession of the scrap cargo until hire was paid. This is simply not the law. Compania had the right to substitute securities so long as that security was acquired before release of the cargo. This it did: the court found that the $535,371.21 which Compania seized represented the proceeds from sale of the cargo [F. 12; R. 222].

(b) The Bank next speaks of an estoppel or waiver based upon the issuance of bills of lading marked prepaid. The bills of lading appear in the record in two batches [San Francisco, Exh. 2; Los Angeles, Exh. 3]. On the San Francisco bills appears the wording "Freight prepaid as per charter party". On the Los Angeles bills the words "Freight prepaid" appear on one side and the words "Terms and conditions as per charter party" appear in the text. Both are clearly types of charter party bills.[9] The Bank argues that the "prepaid" marking exonerates it from any duty it might otherwise have to pay hire, *although it gave no consideration in exchange for the bills.* It likewise argues, *pari passu,* that the charterer Kenray was exonerated by the same markings on account of the charter party's cesser clause.[10]

[9]So-called charter party bills of lading are those the bulk of whose terms are set forth in the charter party itself and not in the bill of lading. As between owner and charterer the bills themselves are only a receipt for cargo. Poor, *Charter Parties* 66 (4th Ed.).

[10]Cesser of liability not cesser of hire. At this juncture the Bank's argument proves too much: from it would follow the conclusion that Compania *never* had an enforceable right to collect hire from anyone since hire was not due until *after* cargo was loaded and bills of lading issued, at which point cargo and the consignees were exonerated because the bills were prepaid. On this reading, the arbitration clause [Exh. 1, Cl. 36], indeed the whole contract, becomes illusory.

The authorities cited by the Bank cannot be so broadly construed. In analyzing an estoppel, it is as important to ask "Who benefits?" as "Who is estopped?". The cases involving a "prepayment" estoppel are uniformly those involving a contest between a bona fide purchaser of the bills of lading and the issuer. This is the significance of *Toro Shipping Corp. vs. Bacon-McMillan Veneer Mfg. Co.* (5th Cir. 1966) 364 F.2d 928, where the court said, at page 930:

> "A review of the jurisprudence suggests, in essence, this broad equitable premise: The shipowner has a maritime lien for charter hire on cargo where a lien is reserved initially in the original charter and expressly incorporated into the bills of lading *except* as against a good faith purchaser of the cargo who had paid for it in advance without notice of the shipowner's rights."

The Bank points to no authority contradicting this limitation. It misreads *The ROBIN GRAY* (2nd Cir. 1933) 65 F.2d 376. That case involved an owner's attempt to exercise its lien against cargo consigned to bona fide purchasers who, in the course of a normal commercial transaction, purchased cargo by paying for prepaid on-board bills of lading. The so-called "factors" were actually "notify" parties under identical bills of lading [See facts set out in the companion case reported at 65 F.2d 375 at 376] whom the court treated quite properly as having "the same rights as purchasers" [65 F.2d at 378]. By no stretch of the imagination does the Bank fall into this category. There was no evidence at trial nor any finding by the court that that Bank gave anything of value in exchange for these documents of title.

A brief aside here on the general average lien which the vessel did assert at Taiwan: that lien arises from a

set of circumstances totally independent of the lien clause or the bills of lading. The owner's lien for general average is derived from the general maritime law [Lowndes and Rudolph, *General Average* 239 (9th Ed. 1964); Gilmore & Black, *Admiralty* 515] not as a matter of contract; its exercise is irrelevant to the issues before the Court.

(c) Finally, the Bank argues that freight monies are such only in the hands of the original obligor: once the obligor has paid, the shipowner's lien fails, the money is no longer "freight".

Preliminary to examination of this argument, it should be noted that the shipowner's lien against freight is never dependent on possession. It is axiomatic that the lien is exercised only when the freights are found in the hands of some third person [*e.g., United States v. Freights of the MOUNT SHASTA* (1927) 274 U.S. 466]. Once again, it is important to analyze the authority on which the Bank relies. One finds the cases cited are uniformly an attempt to procure *double* payment from an innocent third party. In essence, the same situation is presented as in the estoppel cases, *supra*. The third party shipper is to be protected. Note, for example, the language in *The AUDREY J. LUCKENBACH*[11] quoted and emphasized by the Bank at page 45 of its brief: had the freights been paid by the shipper, the situation *as to him* would be different. The *Norgulf* case,[12] upon which the

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[11] *Luckenbach Overseas Corp. vs. Subfreights of The AUDREY J. LUCKENBACH* (S.D. N.Y. 1963) 232 F. Supp. 572.

[12] *In re North Atlantic and Gulf S.S. Co.* (S.D. N.Y. 1962) 204 F. Supp. 899, *aff'd sub nom Schilling vs. A/S D/S Dannebrog* (2d Cir. 1963) 320 F.2d 628.

Bank places primary reliance is no broader. As already pointed out, the case involved competing claims against money in the hands of the shipper. The court held the shipowner's claim was superior to that of other claimants. The *dicta* quoted by the Bank [204 F. Supp. at 904] can only be read in this context, as the unquoted balance of the same paragraph makes clear. The court's attention was directed *solely* to the rights and duties of the owner and the shipper as against each other.

Hence the Bank's argument reduces to the single proposition that freight money altogether loses its character as "freight" as soon as it is paid. One is reluctant to dispute with so prominent an authority as Wharton Poor, but Compania is compelled to do so to the extent his statement [Poor, *Charter Parties* 48, quoted in Op.Br. 35] is understood to go beyond the decided cases. The court will note that Mr. Poor cites no American authority to sustain his statement. In fact, American authority is directly contrary to the statement made: under American law, freight monies remain "freights" in whosoever's hands they are found *so long as* they can be identified. The quotation taken by the Bank from Stephens, *Freights* 200 is likewise made in ignorance of American case law. Stephens was writing in 1907 and he uses as his sole authority an English case decided some years before that.

In the United States, the Admiralty has long recognized the principal that assets, including freights, may be traced into the hands of third parties. In *Bank of British North America vs. The Freights of The HUTTON* (2d Cir. 1905) 137 Fed. 534, the court makes the following statements:

> "It is familiar doctrine of the admiralty courts that a maritime lien attaches not only to the original subject of the lien, but also to whatever is substituted

> for it, and that the lienholder may follow the proceeds wherever he can distinctly trace them. 'Wherever there is a maritime lien upon property, it adheres to the proceeds of that property, into whose hands soever they may go, and these proceeds may be attached in the admiralty.' Benedict, Adm. Pract. § 290 (3d Ed.), where the authorities are collected in the note." 137 Fed. at 536.
>
> "The lien should survive . . . whether the freights were unpaid by the consignees and remained in their hands, whether they were in Perry's hands in the form in which they had been paid, or whether they were in his custody in the form of proceeds deposited in his bank account." 137 Fed. at 537.

The decision in *The JOHN ENA,* already cited, is to the same effect, that maritime liens may be asserted against monies which are passed from the hands of the original obligor into the hands of others; even in those cases where the person holding the monies claimed an interest therein as a matter of right.

And as was said in *The SURICO* (W.D. Wash. 1930) 42 F.2d 935 at 936:

> "[T]hat lien [against freights] is assertable in a court of admiralty, and follows the freight, and attaches to the proceeds and revenue that can be distinctly traced, and adheres to the proceeds in whose hands soever they may come."

The Bank's attempt to interpose factual distinctions between the present case and those cited above does not meet the principle of law involved: that the holder of a maritime lien may follow that lien into the hands of third parties just as Compania has done in this case.

In *The JACKIE HAUSE, supra,* the court *held* that the charterer had in fact no right to earned freights while hire remained unpaid.[13] How then can one standing in the charterer's shoes, knowing that hire was unpaid, urge that mere transfer of possession gives it an advantage it would not otherwise have? The answer is: it cannot.

To summarize, it is Compania's position that the lien given it under the charter party extends to cargo and to freight earned by cargo; that freight was indeed earned on SEARAVEN's cargo; that it was entitled to assert its lien against monies found in the Bank's hands (the question of identification not being at issue); and that nothing in the Bank's position gives it the privilege to assert a waiver or estoppel created for the benefit of someone else.

VI

THE BANK'S CONDUCT CLEARLY JUSTIFIED THE TRIAL COURT IN HOLDING IT AS A CONSTRUCTIVE TRUSTEE FOR COMPANIA'S BENEFIT.

The Bank's chief remaining argument is addressed to the proposition that nothing in the record sustains the court's finding it would be unjustly enriched at Compania's expense were Compania not paid its hire out of the funds which the Bank holds. To place this argument in perspective it is necessary first to recognize that, as between Compania and the Bank, Compania's claim to the funds not only is maritime, which the Bank's is not, but is a priority lien claim, which the Bank's is not either. *Freights of The KATE* (S.D. N.Y. 1894) 63 Fed. 707.

Indeed the position of the Bank is that of the charterer in whose shoes it stands. *That* position is explicitly subordinate to the rights of the shipowner.

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[13]Quoted *infra* at p. 20.

"Assuming (without deciding) that the claim and lien of the charterer passed by assignment to Cooper [the stevedore], the latter would then have a lien on the Barr sub-freights. As the opinion points out, however, the charterer could give up to Cooper no more than it had and whatever it had was subject to the superior and earlier lien of the owner." *Luckenbach Overseas Corp. vs. Subfreights of the AUDREY J. LUCKENBACH* (S.D. N.Y. 1963) 232 F. Supp. 572, 577 (on rehearing).

"The inchoate rights to freights of the 'Pacific Wave' which Pegor had assigned never ripened. Pegor was not the owner of the 'Jackie Hause' and under the voyage charter it did not become the owner pro hac vice; N. H. Shipping Corp. remained in full control and possession of the 'Jackie Hause', it disbursed her wages, fuel, stores, stevedoring and agency fees, and it issued the Bills of Lading marked 'freights as per charter party' signed by her Master. Having no rights to the freights of the 'Jackie Hause', Pegor could not assign them; as voyage charterer all it could assign was surplus freights earned, if any, after full payment of the vessel's hire and its lien on such surplus could not arise until that time." *N. H. Shipping Corp. vs. Freights of the JACKIE HAUSE* (S.D. N.Y. 1959) 181 F. Supp. 165, 170.

The Bank thus makes the bootstrap argument that its own misfeasance entitles it to obtain a priority to which it is not entitled. To do so it must dispute the trial court's findings, made from essentially uncontested testimony, that it instigated the sale of scrap in Taiwan to minimize a substantial loss it otherwise faced [F. 6; R. 219-20], that it solicited Kenray to arrange a charter fixture without letter of credit security in order to protect its — the

See also:

Restatement of Restitution § 160;
Ward vs. Taggart (1959) 51 Cal.2d 736;
Blair vs. Mahon (1951) 104 Cal.App.2d 44.

As Pound pointed out long ago, a constructive trust is remedial, "affording specific restitution of a received benefit in order to prevent unjust enrichment." Pound, *The Progress of the Law,* 33 Harv. L. Rev. 420, 421 (1920). This case presents at least three independent bases on which a constructive trust could be supported: constructive fraud [V Scott, *Trusts* § 462.4]; unjust enrichment [V Scott, *Trusts* § 462, at 3413]; breach of the confidential relationship between Kenray and the Bank. [West. *Cal. Civ. Code* § 2224]. Each of these bases is amply supported by the evidence and the court's findings as already noted.

The Bank's argument is actually one it should have addressed to the trial court: that Compania proved a case, but not enough of a case. Each of the cases it cites in support is distinguishable on its facts. For example, *Fowler vs. Security-First National Bank* (1956) 146 Cal. App.2d 37 involves an attempt to prove an oral agreement directly conflicting with a clear testamentary bequest. However, the true point is that the Bank does not — indeed cannot — urge the court's findings are clearly erroneous. This is the limit of its right as an appellant.

Reliance on the "creditor" cases[14] is likewise misplaced. None involve, as here, circumstances in which the holder of the trust *res* (the Bank) and the holder's assignor (Kenray) acquire specific property subject to a specific prior right. Contrast *the JACKIE HAUSE, supra.* Nor

[14] *Zirker vs. Baber* (1958) 161 Cal.App.2d 355; *Woodruff vs. Coleman* (D.C. 1953) 98 A. 2d 22; *McKey vs. Paradise* (1936) 299 U.S. 119.

do they involve facts where the holder manipulated circumstances so as to obtain possession of the trust *res* in the first instance. The trial court quite properly felt, as it held, that the Bank's conduct imposed on it the cost of the ocean freight.

VII

THE AWARD OF INTEREST WAS PROPER

The Bank's argument that interest was improperly awarded can be dealt with quickly. While it is true interest is a matter of discretion with an admiralty judge, it is routinely awarded in absence of specific facts.

The PRESIDENT MADISON (9th Cir. 1937) 91 F.2d 835, 845-48;

The STJERNEBORG (9th Cir. 1940) 106 F.2d 896, 898-99, aff'd 310 U.S. 268, 84 L.Ed. 1197, 60 S.Ct. 937 (1940);

Steeves vs. American Mail Line (9th Cir. 1946) 156 F.2d 59;

Medina vs. Erickson (9th Cir. 1955) 226 F.2d 475, 484;

Ursich vs. DaRosa (9th Cir. 1964) 328 F.2d 794, 798;
Firemen's Fund Ins. Co. vs. Standard Oil Co. of Cal. (9th Cir. 1964) 339 F.2d 148, 159.

In urging that judgment could be liquidated only as against the sum of $96,750, the Bank ignores the fact that judgment was awarded against the entire *res,* an amount exceeding $500,000,[15] as well as *in personam* against it. It cites no authority for its proposition, contrary to the findings of the court below, that the court exercised its power *only in rem* and *only* against the sum of $96,750.

[15]As noted above, $145,000 was deposited by stipulation of the parties [R. 59].

VIII

CONCLUSION

At trial the Bank urged it was much like the corner grocer, innocent and naive in the ways of the sea. In somewhat more conservative language, it makes the same claim here. The evidence showed — and the court concluded — that the Bank was in fact the dark eminence standing behind the SEARAVEN's fateful voyage. This court has faced such a situation before. In *Northwest Marine Works vs. United States* [*The AUDREY II*] (9th Cir. 1962) 307 F.2d 537, the United States attempted to prefer its mortgagee rights by operating a vessel under foreclosure and *in custodia legis*. On that occasion this Court said, at page 541:

> "We do hold that when the government, as mortgagee, elected, instead of foreclosing, to continue the operation of the vessel, for its own purposes and benefit, it did so at its own risk, and not at that of appellant lien holders. It would be grossly unfair to permit the government, by proceedings that were essentially ex parte as to these appellants, to put the ship on the high seas upon whatever terms it might choose, as a sort of floating credit card payable to bearer, presumably able to incure [*sic*] maritime liens which would ordinarily, because later in time, prevail over those of appellants (*The St. Jago de Cuba,* 9 Wheat. 409, 416, 22 U.S. 409, 416, 6 L.Ed. 122), and then, by advancing moneys to pay those who would otherwise have such liens, gain priority over appellants."

Were this Court to accept the Bank's argument, then the Bank would be permitted to effect just such a fraud as was rejected in *The AUDREY II*.

But the law demonstrates the Bank's legal argument must be rejected. Compania properly exercised its lien rights in timely fashion. The Bank has no standing to contest this exercise. Its appeal should be denied.

Dated:

Respectfully submitted,

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES

By _____
JOHN C. MCHOSE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY SOWARDS, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22695

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable John C. Bowen
District Judge

EUGENE G. CUSHING
United States Attorney

MICHAEL J. SWOFFORD
Assistant United States Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

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STATEMENT OF JURISDICTION

This is an action under the Federal Tort Claims Act, the District Court having jurisdiction pursuant to 28 U.S.C., § 1346(b). Final judgment was entered by the District Court on November 30, 1966 (CT 121) wherein the Court found in favor of the defendant and against the plaintiff. Notice of Appeal was filed on February 13, 1967 (CT 139), and jurisdiction of this Court arises under 28 U.S.C., § 1291.

Prior to trial, the defendant admitted limited liability in the Pre-Trial Order (CT 72) as follows:

> "The defendant hereby admits liability to the plaintiff for such personal injuries as are shown by a preponderance of the evidence at trial or by the admitted facts, to be the proximate result of the collision hereinabove described."

COUNTERSTATEMENT OF THE CASE

On July 24, 1963, appellant was driving a large tractor with 40-foot trailer designed for hauling cement across a railroad track located at the Naval Supply Depot, Seattle, Washington. As appellant's tractor cleared the track, a flatcar which was being coupled to an engine and five other cars operated by appellee, moved slightly (RT 545) and struck the appellant's trailer in the side about six feet from the rear (RT 215). The impact resulted in a "thumping or bumping" sound (RT 545). Appellant's truck and trailer continued to

clear the railroad tracks by approximately twenty feet and was then brought to a stop (RT 552), at which time appellant exited from the truck and stated that he had not been hurt (RT 553, RT 38). He also refused an offer of first aid treatment (RT 218).

After completing an accident report for the Naval authorities, appellant returned to his place of business, and then drove the truck which had been reloaded with cases of liquor, to his home in Everett, Washington. Upon his arrival in Everett, he visited his family physician who administered pain pills and muscle relaxors (RT 291).

Contrary to his doctor's advice (RT 292), appellant returned to his employment as a truck driver the morning following the collision and continued to work steadily for approximately three months until he was fired (RT 89-90, 97 and 226) in October, 1963,for misleading his employer. His duties included the lifting and moving of heavy objects (CT 98) during this time period.

From October, 1963, until the date of trial, appellant worked for a number of firms but terminated his employment with each not because of physical disability but because of personal reasons (RT 221-265). He did not miss any days of work during this period for reasons of health. Appellant's work record is as follows:

Everett Trucking Company, May through August,1964 - quit to take a better job. (RT 227)

Sound Metal, August, 1964 - appellant quit (RT 228).

Morrison Logging - worked one week running a steam shovel - quit for another job (RT228).

Provisioners - appellant quit because he didn't want to go to Denver with a co-employee (RT 228).

Fishmans Transportation Co. - worked there for three months in fall of 1964 - quit because employer wouldn't pack the front wheels of the truck, and because of personal disagreement with employer (RT 229).

Everett Trucking Company - appellant worked there again from January, 1965, until May, 1965, when he quit, evidently due to an incident in which he was involved in Los Angeles during which he "beat up" three police officers (TR 236).

Ross and Hogland - appellant worked there from June, 1965, until NOvember 27, 1965, on which date he was involved in another serious truck accident. That was the last day on which he ever worked as a truck driver (TR 236).

On November 27, 1965, appellant was driving a large truck near Merced, California, when he was involved in another accident. Appellant passed out at the wheel of the truck either from lack of sleep or from loss of blood caused by the extraction of his teeth four days prior to the accident.

He also had diabetes which could cause blacking out (TR 350). The truck and trailer hit a guard rail, breaking the trailer loose from the tractor and tipping it over. The entire cab in which appellant was sitting was lifted up in the air and went over forward, during which time appellant made several circles inside the truck striking hard objects therein (TR 239). Both the tractor and trailer were totally demolished (TR 241-242) and appellant sustained several abrasions, contusions, lacerations on his forehead and a severed facial nerve (TR 240), among other injuries.

It also should be noted that appellant was involved in other accidents prior to the one in 1963. He had previously flown an airplane through a house (TR 209) and in 1959 was involved in a rear-end collision (TR 210) which necessitated him spending nine days in the hospital.

It should be further noted that appellant's complaint was twice dismissed prior to trial for dilatory tactics. On April 8, 1966, the complaint was dismissed with prejudice because of appellant's failure to answer interrogatories (CT 13), and was dismissed a second time on June 23, 1966, for failure to prepare for trial (CT 51).

Appellant was limited to two medical expert witnesses by court order dated November 1, 1966 (CT 165). Dr. Mullins was eliminated as an appellant's witness (by deposition) because his deposition was taken, over Government objection,

only two court days prior to trial. Dr. Burgess was eliminated as a witness because his last examination of appellant was in May, 1965, prior to the November, 1965, truck accident, and Dr. Burgess had not re-examined appellant subsequent to said accident.

ISSUES PRESENTED

1. a. Whether a district court has power to limit the number of expert witnesses which a party may call.

b. Whether the district court properly eliminated Dr. Burgess and Dr. Mullins as expert witnesses.

2. Whether the district court properly excluded the results of a medical examination which was conducted on the day of trial without notice to appellee.

3. Whether records of a State of Washington administrative agency showing payment of appellant's medical bills was properly excluded when offered as the only evidence of the amount and reasonableness of said medical bills.

4. Whether a trial court has discretion to determine whether or not a witness qualifies as an expert.

5. Whether appellant's failure to prove that the appellee's negligence on July 24, 1963, was the proximate cause of his injuries, if any, at time of trial.

SUMMARY OF ARGUMENT

1. a. A trial court has discretion to limit the number of expert witnesses.

b. The testimony of Dr. Burgess was properly eliminated because he had not examined appellant subsequent to the second accident. The testimony (by deposition) of Dr. Mullins was properly eliminated because it was taken only two court days prior to trial with only one day notice to appellee.

2. The court properly excluded the results of a medical examination of plaintiff conducted on the day of trial because appellee had no notice of said examination and no discovery was possible.

3. The court properly excluded Washington State Department of Labor and Industries records showing payment of appellant's medical bills.

4. The determination of whether a witness qualifies as an expert is within the sound discretion of the trial court.

5. There was failure of proof by appellant both as to proximate cause and damages, and there was ample evidence to support the court's judgment in favor of appellee.

ARGUMENTS

GENERAL BACKGROUND

Commencing April, 1966, this case has been repeatedly delayed by the dilatory tactics of appellant. Twice dismissed with prejudice for failure to answer interrogatories, for withholding information in interrogatories, and for non-preparation of appellant's case, and then delaying several months because one of appellant's doctors went to Europe, this case has shown some considerable indulgence to appellant's delays. Appellant has now asked the Appellate Court to reverse the fairly given and lengthy trial on grounds that the trial court refused to further indulge several procedurally defective attempts of appellant to get non-admissible evidence before the Court.

I.

THE COURT PROPERLY LIMITED THE NUMBER OF MEDICAL EXPERTS.

Appellant's first contention of error is that the trial court abused its discretion by limiting the number of appellant's expert witnessess from four to two medical doctors. This limitation was allegedly made in open court on November 1,1966 but the Court's and counsels' discussion of the issue is not available inasmuch as a court reporter was not present.

The law is clear that the number of witnesses permitted to testify to a single point is within the sound judicial discretion of the trial court, the purpose of limitation of

witnesses being to prevent cumulative evidence. Suhay v. United States, 95 F2d 890 (10 Cir. 1938), cert. denied 304 US 580; Chapa v. United States, 261 Fed. 775 (5 Cir. 1919), cert.den. 252 US 583; Burgman v. United States, 188 F2d 637 (D.C. Cir. 1950), cert. denied 72 S.Ct. 1964).

Rule 83 of the Federal Rules of Civil Procedure gives each District Court the power to make and amend rules governing its practices. Pursuant to said authority, Rule 28(d) of the Rules for the United States District Court for the Western District of Washington provides as follows:

> "Except as otherwise ordered by the Court, a party shall not be permitted to call more than one expert witness on any subject."

Being permitted to call two medical doctors, appellant was accordingly entitled to call more expert witnesses than the Rule permits. This is especially significant in view of the fact thatthe appellee limited itself to one expert witness on the subject of appellant's physical condition.

Of greater significance is appellant's allegation that the court arbitarily determined which of appellant's four doctors could appear as witnesses. This ruling was allegedly made at an unreported hearing on November 1, 1966. The fact is thatthe Court eliminated Doctors Burgess and Mullins for good reason, rather than arbitarily picking at random which of the four doctors could testify. The reasons for eliminating Dr. Burgess and Dr. Mullins are as follows:

1. Dr. Burgess, an orthopedic surgeon, examined appellant on only two occasions, in 1964 and in May, 1965. He did not examine plaintiff at any time after the November 27,1965, accident in California in which plaintiff sustained serious injury. Accordingly, Dr. Burgess' testimony would have been limited to appellant's condition prior to the November 27, 1965, accident. It should benoted that Dr. Burgess did have an opportunity to examine appellant after the second accident, inasmuch as the trial was delayed for several months so that Dr. Burgess could go to Europe. He returned on October 10, 1966, but appellant did not arrangefor any examination prior to trial. Since Dr. Burgess' testimony would have been limited to showing appellant's condition before the second accident, his testimony would have been cumulative inasmuch as Dr. Garner testified as to appellant's condition both before and after the second accident, and Dr. Grossman testified as to his condition subsequent to the second accident. Dr. Burgess would have been unable on the basis of his examination to segregate damages between the first and second accidents as required by law.

2. Dr. Mullins: The defense had never heard of Dr. Mullins until three court days prior to trial. At that time (October 27, 1966) appellant orally moved the court for an order allowing the taking of Dr. Mullins deposition on the following day (October 28, 1966) in order to perpetutate his

testimony inasmuch as he would be out of town on date of trial. This was insufficient notice in violation of Rule 30 of the Federal Rules of Civil Procedure which provide:

> "(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. . . . "

Nevertheless, the court allowed the taking of the deposition, but also allowed the appellee to renew its objections at time of trial (CT 70). The unfairness to appellee of appellant's last-minute tactics is best shown by the objection made by defense counsel at the time deposition was taken.

> "We oppose the taking of this deposition or its subsequent use because . . . the one day's notice to us that this deposition was going to be taken was not sufficient under the Federal Rules of Civil Procedure or any other rule, because it does not give us sufficient time to adequately prepare for cross-examination, to consult with other medical specialists, and, of course, trial is only two court days away. It is, therefore, impossible for us to arrange medical examination, a subsequent medical examination of the plaintiff and if new issues, symptoms or injuries are raised by reason of this deposition, we are taken by surprise and no conceivable way that we can rebut or prepare a defense prior to trial. . . .
>
> "Furthermore, there is no necessity for this deposition to be taken inasmuch as this case having been filed over a year ago and at issue nearly a year, there have been four doctors in addition to the treating physician that examined the plaintiff on behalf of plaintiff's counsel. . . And this makes the fifth doctor that has been called as potential medical expert witness by the plaintiff. . . . "

> "Additionally, inasmuch as the purpose of this deposition is for the purpose of perpetuating testimony for trial rather than discovery, this amounts to the taking of evidence of a witness with only one day's notice to the defense that he was even going to be a witness in the case. As such, this gives us no possible way to investigate the background of this witness, his qualifications, or to prepare any possible impeachment or discover if any would be appropriate. The very purpose for which pre-trial discovery in the Federal Rules are designed is avoided if this deposition is used at the time of trial." (Deposition of Dr. John R. Mullins, pages 3 through 5).

One of the purposes of the discovery rules is the avoidance of surprise. As stated in 38 Columbia Law Review 1436:

> "The deposition-discovery device under the new rules aid in preparation for the trial more fully than any previous procedure. Such assistance is of several types:
>
> (1) Avoidance of surprise;
> (2) Affording an intelligent basis for trial brief;
> (3) The preservation of testimony likely to be needed."

Appellant's attempt to take Dr. Mullins' deposition two court days prior to trial, on one day's notice to the defense, certainly contravenes the purpose of the Federal Discovery Rule, and the trial court therefore properly excluded Dr. Mullins' testimony (by deposition).

In summary, the court on November 1, 1966, properly excluded both Dr. Burgess and Dr. Mullins as witnesses for good reasons, and did not arbitrarily decide which doctors could testify, as alleged by appellant. Such a determination was within the discretion of the trial court, and in recognition of the rules.

II.

THE COURT PROPERLY EXCLUDED TESTIMONY OF A MEDICAL EXAMINATION MADE ON THE DAY OF TRIAL.

Dr. Grossman, an internist, examined appellant in June, 1966. At that time he apparently did not take physical measurements of appellant's leg. Dr. Grossman then conducted another physical examination of appellant on the day of trial, without notice to defense counsel (RT 129), and attempted to introduce evidence relating to the medical findings made on the day of trial. Defense counsel objected to the evidence as follows:

> "Mr. Barer: I would object to any statement or questions or answers as to his examination conducted today. This examination today, if it did occur, is after the pre-trial order, after the time of discovery, there is no possible way we could havediscovered this medical testimony today. I feel this is outside the scope of the Federal Rules of Civil Procedure and that it should not be allowed into evidence in this courtroom."
>
> "The Court: Did you give counsel notice that you wish to have further exploration made today?"
>
> "Mr. Caughlan: No, your Honor."
>
> "The Court: The court will have to sustain the objection and does so."

Crucial to this objection is Rule 26(d)(2) of the Rules for the Federal District Court, Western District of Washington, which read as follows:

> "Unless otherwise ordered by the court, all parties shall exhaust the discovery procedures provided for in Rule 26 through 37, Federal Rules of Civil Procedure, prior to the conference of attorneys."

The appellee was given no notice of Dr. Grossman's examination on the day of trial in direct violation of the purpose of the Federal Rules, and was given no opportunity to prepare rebuttal testimony or even to make discovery, all in violation of the Federal Rules and Procedural Due Process. All medical information should have been exchanged at the time of the pre-trial order and appellant had no right to introduce without notice new evidence resulting from a medical examination conducted on the day of trial.

III.

THE COURT PROPERLY EXCLUDED WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRY RECORDS SHOWING PAYMENT OF PLAINTIFF'S MEDICAL BILLS

Appellant attempted to prove the existence and reasonableness of his medical bills by offeringevidence from the Washington State Department of Labor and Industries indicating that said Department had already paid all of appellant's medical bills. The appellee objected and counsel stated as follows:

> "We will not object to bills that were charged for services for Mr. Sowards being admitted into evidence nor the reasonable value being shown so long as there is no evidence admissible to show who paid for them, particularly the Washington State Department of Labor and Industries, because that necessarily involves the matter of discretion with them as to whether they honor the claim or think there is in fact any injury or think the bill is reasonable. We are not trying to prevent this man from proving his damages or what the bills were." (Tr 402)

The objection to said testimony and said records was properly sustained for the following reasons.

1. A showing that appellant's medical bills had been paid by someone other than appellant would be inadmissible without proof of a legal obligation.

2. A decision made by an administrative body would have no probative value in court without laying a proper foundation.

3. There was no privity between the appellee and the Washington State Department of Labor and Industries. The general rule is that testimony and evidence given at a trial cannot be used at a subsequent trial between different parties not in privity with the parties to the former action. Duffy v. Blake, 91 Wash. 140, 162 Pacific 521.

4. The fact that insurance is involved is entirely immaterial in a court of law, and the wanton introduction of such fact by the plaintiff is positive error, essentially prejudicial to the defendant, and constitutes grounds for reversal if plaintiff were victorious. William v. Hofer, 30 Wash. 2d 253 (1948); Moy Quon v. Furuya Company, 81 Wash. 526; Jensen v. Schlenz, 89 Wash. 268; Gianni v. Cerini, 100 Wash. 687; Lucchesi v. Reynolds, 125 Wash. 352.

The appellee did not object to appellant showing reasonable damages by the introduction of medical bills, and then having a doctor testify as to the reasonableness of such bills

Appellant could easily have had either Dr. Gardner or Dr. Grossman, while they were on the stand, examine the bills and testify as to their reasonableness. However, appellant failed to elicit any testimony concerning medical bills from either of his doctors.

Appellant's citation of Standard Oil Coompany v. United States, 153 F2d 958 (9 Cir. 1946); and Rayfield v. Lawrence, 253 F2d 209 (4 Cir.1958), does not give any weight to appellant's argument inasmuch as the appellee admits that appellant is not barred from recovering damages merely because he also recovered insurance proceeds. This ruling in no way changes the requirement of proving damages by competent evidence.

IV.

THE DETERMINATION OF WHETHER A WITNESS QUALIFIES AS AN EXPERT IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

Appellant contends that the court erred in admitting the testimony of Morris Fishman on ground that he lacked qualifications as an expert. The law is well settled that the qualifications of a witness to testify as an expert is a matter within the discretion of the trial court. Bratt vs. Western Airlines, 155 F2d 850 (10 Cir. 1946); Rogh v. Bird, 239 F2d 257 (5 Cir.1956).

In Bratt, supra, the trial court sustained an objection to the opinion of an expert witness on ground that he was not

properly qualified to express an opinion. The opinion sought was as to the cause of the crash of a DC-3 commercial airplane. The witness was an aircraft mechanic who did not have a commercial pilots license and who had not been certified by the Civil Aeronautics Administration. However, he had had extensive experience as a private pilot and had substantial actual experience and training in aerodynamics. The Appellate Court reversed the trial court, stating that it had applied incorrect legal standards in refusing to permit the testimony. The court stated at page 85[illegible]:

> "If actual experience cannot be the test in cases of this kind, when then does a witness become qualified to testify from special experience concerning the scientific cause of an accident not susceptible to direct proof. There is no prcise requirement as to the mode in which requisite skill or experience shall have been acquired. A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research."

In Firemens Fund Insurance Company v. Collins, 220 F2d 150 (5 Cir.1955) the court approved the admission of expert testimony as to the effect upon a tractor-trailer of upsets by a witness who was the president of a trailer company and who was thoroughly familiar with the construction of trailer. See also Rich v. Ellerman and Bucknall S.S.Company, 278 F2d 704 (2 Cir.1960); Higgins, Inc. v. Hale, 251 F2d 91[illegible] Cir. 1958); Shipley v. Pittsburgh L.E.R. Company, 83 F.Supp. 722 (W.D.Penn. 1949); Allied Van Lines v. Parsons, 293 Pac. 2d 430 (Ariz. 1956).

V.

THERE WAS A FAILURE OF PROOF BY APPELLANT BOTH AS TO PROXIMATE CAUSE AND DAMAGES.

Plaintiff contends that the evidence does not support the court's judgment in favor of the defendant, especially in view of the fact that defendant admitted liability prior to trial for all injuries proximately caused by the accident on July 24, 1963. The following evidence supports the court's finding that the plaintiff's injuries, if any, at time of trial were not proximately caused by defendant's negligence on July 24, 1963:

1. The fact that plaintiff was involved in two accidents prior to July 24, 1963, and one more serious accident after, and on November 27, 1965, and plaintiff's inability and failure to segregate damages, if any.

2. Dr. Fein's testimony that he could find no objective findings to substantiate any physical impairment resulting from the accident on July 24, 1963 (TR 457, 459, 480).

3. Dr. Gardner's testimony infering the seriousness of the November 27, 1965, accident and injuries (TR 335).

The following evidence would allow the trial court to disbelieve all testimony rendered by plaintiff himself:

1. Plaintiff's attempt, while being examined by Dr. Fein, to impart false information as to his ability to turn his head without pain (TR 456).

2. Plaintiff's ability to work the day following the 1963 injury, contrary to medical advice, and for some time thereafter.

3. Testimony that plaintiff had never left subsequent employment for reasons of health.

4. Plaintiff's attempt to have a Certified Public Accountant falsify official record indicating dates on which plaintiff was employed and had been paid (TR 508, 509).

SUMMARY

Plaintiff had a fair, impartial, and lengthy trial. There is a failure of proof by plaintiff both as to proximate cause and damages, and there is ample evidence to support the court's judgment in favor of the defendant. The defendant respectfully prays that said judgment be affirmed.

Respectfully submitted,

Eugene G. Cushing

EUGENE G. CUSHING
United States Attorney

Michael J. Swofford

MICHAEL J. SWOFFORD
Assistant United States Attorney

DATED this 27th day of September, 1968.

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellate Procedure and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL J. SWOFFORD
Assistant United States Attorney

DATED at Seattle, Washington, this 27th day of September, 1968.

No. 22696

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC.,
Appellant,

vs.

WESTINGHOUSE ELECTRIC CORP.,
Appellee.

Opening Brief of Appellant Southwest Forest Industries, Inc.

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JURISDICTION

This action originated in the United States District Court for the District of Arizona on December 17, 1963, pursuant to 28 U.S.C.A. §1332 (TR 1-10).

The lower Court rendered an Opinion (TR 978-1007) and an Order and Judgment (Partial Summary Judgment) (TR 1008-1010), which were filed on September 8, 1967, in which the lower Court ordered that Appellee's Motion for Partial Summary Judgment as to all portions of Appellant's complaint, other than Count Three (anti-trust) be granted (TR 1011). The lower Court also expressly determined in its Order and Judgment (Partial Summary Judgment) that there was no just reason for delay and expressly directed the entry of final judgment in accordance with the lower

Court's Order and Judgment (Partial Summary Judgment) notwithstanding the fact that there remained other claims which had not been disposed of by the Court's Order and Judgment (TR 1011).

Appellant thereupon moved to Alter and Amend the Judgment on September 18, 1967 (TR 1013-1083) and said motion was denied by the Court on December 4, 1967. Appellant thereupon filed a Notice of Appeal on December 28, 1967 (TR 1193) and on the same date filed a bond for costs on appeal (TR 1194-1196). The jurisdiction of this Court rests on 28 U.S.C.A. §1291.

STATEMENT OF CASE

For the convenience of the Court, the individual parties will be referred to by their first names. The Appellant, Southwest Forest Industries, Inc., will be referred to as "Southwest", and the Appellee, Westinghouse Electric Corp., will be referred to as "Westinghouse."

In the late 1950's feasibility studies were conducted to determine whether or not it would be advisable for Southwest to build a pulp and paper mill to be located near Snowflake, Arizona. Assisting Southwest in portions of the feasibility studies was the Rust Engineering Company, a Delaware corporation, having its principal office in Pittsburgh, Pennsylvania (hereinafter called "Rust"). In order to have the necessary electrical power to run the Kraft and Newspaper Mill, it was determined that a 25,000 kw turbine generator unit was necessary.

On May 3, 1960, Rust sent an inquiry to Westinghouse addressed to the Westinghouse Electric Corp., Steam Division Sales Department (Exhibit CCC), wherein Rust requested that Westinghouse submit their proposal for furnishing one 25,000 kw turbine generator in accordance with certain specification. On page 3 of Exhibit CCC, Rust informed Westinghouse that:

> The proposed unit will be the sole source of electrical energy for a Kraft and Newsprint Paper Mill and shall therefore be of proven design and so constructed that long periods of trouble free operation can reasonably be expected.

On May 17, 1960, Southwest and Rust entered into an Engineering and Construction Contract (Ex. 1), wherein Southwest employed Rust, among other things, to install, erect and construct a pulp and paper mill and related facilities for the production of Kraft products.

On May 18, 1960, Westinghouse answered Rust's inquiry of May 3, 1960, by Exhibit DDD. In the cover letter accompanying the turbine-generator proposal, it was stated, by Mr. J. J. Sherman on behalf of Westinghouse:

> We are pleased to quote a price of $1,137,000.00 for the equipment covered in our proposal. *The equipment can be shipped from our factory in 15 months from the time a firm order with comlete information is received.* If this delivery does not line up with your requirements, we would appreciate the opportunity of negotiating with you in an effort to meet your needs. Deliveries on large items such as this can change rapidly because of the situation on large castings and forgings. Drawings for approval could be submitted in 90 days after receipt of an order. (Emphasis added)

In addition, the cover letter continued by stating:

> *In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, we direct your attention to several Westinghouse features that contribute to the high reliability of our unit. We urge that these features be considered in your evaluation.*
> (Emphasis added)

Near the bottom of the first page of the cover letter sent by Westinghouse to Rust, it stated in small, inconspicuous type: "Subject to the terms and conditions on the back of this quotation". On the reverse side of page one of the transmittal letter from Westinghouse to Rust, it is stated in part:

> WARRANTY—Westinghouse, in connection with the apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the

defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On June 6, 1960, the Rust Engineering Company by S. D. Clarke, Jr., Purchasing Agent, wrote a letter to the attention of Mr. J. J. Sherman of Westinghouse (Ex. EEE), wherein Mr. Clarke stated:

> It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit. Generally in accordance with your above referenced proposal.
>
> *However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand has been established for approximately 13½ months.* (Emphasis added)

Apparently, on June 13, 1960, Westinghouse sent to Rust an order acknowledgement form (see Ex. Y-1), which stated on the bottom: "See reverse side for terms and conditions" and on the reverse side thereof, the same statements with regard to the warranty provisions are stated as found in Exhibit DDD. However, it should be noted there are various notes contained on the order acknowledgement form for various people, of which Note One stated:

> Verbal order given to G Fortibi South Phila medium turbine sales of May 31, 1960 to proceed with outline data and loading information for customer with shipment required by July 15, 1961 or before.

Note Three stated:

> All necessary information must be available by July 7, 1960 for contract meeting with Rust Engr Co which will enable them to proceed with their engineering works.

However, it should be noted that there is no showing that Southwest received Exhibit Y-1 until March 29, 1962.

On June 14, 1960, Southwest specifically appointed James A. Stacey as its agent for the sole purpose of signing purchase orders to be issued in its name in connection with the construction of a pulp and paper mill and related facilities near Snowflake, Arizona (Exhibit KKK). The authority specifically granted by Southwest to James A. Stacey was to sign purchase orders issued pursuant to § "C" of Article I of an Engineering and Construction Contract between Southwest and Rust, dated May 17, 1960 (Pl. Ex. 1).

The next event to occur between the parties was on July 6, 1960, when Southwest accepted Westinghouse' offer to sell one 25,000 kw turbine generator by sending to Westinghouse a purchase order (Exhibit 2-A). On the front of Southwest's acceptance, it is stated near the top:

> This order is subject to the terms and conditions set forth on the reverse side hereof.

Near the bottom of the page, in bold type, it is stated:

IMPORTANT INSTRUCTIONS

Underneath the important instructions it is stated:

> Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

The reverse side of page 1 of Ex. 2-A states, in bold conspicuous type:

> THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:
>
> . . .
>
> (2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper

quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.

. . .

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.

On Exhibit 2-A, Mr. J. J. Rice of Westinghouse wrote in longhand:

Will ship w/o 7/10/61
J. J. Rice 8/9/60

and stamped the following:

ORDER PG 88081

In referring to this order please use this number as a reference.

Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.

Mr. Rice crossed out the word "attached" and then did not transmit to either Southwest or Rust the "W. E. Corp. form of acknowledgement" (Appeal Transcript, p. 86).

On July 19, 1960, November 9, 1960, December 1, 1960, and January 20, 1961, Southwest revised its prior acceptance of the Westinghouse offer and in all cases Westinghouse stamped their acceptance thereon, and again crossed out the word "attached" in their acceptance stamp (Exhibit 2-A).

The erection for the turbine generator unit commenced on June 26, 1961, and the turbine itself arrived at the mill on August 21, 1961 (see answer to Interrogatory 1(a)(v)(ii) TR 368) and the installation of the turbine generator unit was completed on October 13, 1961. (See answer to Interrogatory 1(k) TR 373). On October 17, 1961, the turbine generator unit was first put into operation, but without the extraction stages (Appeal Transcript p. 110). On December 17, 1961, one extraction stage was put on the line and on December 22, 1961, both extraction stages were put on the line for the first time (Appeal Transcript, pp. 119-120).

From the very first day both extraction stages were put on the line, Southwest experienced a multitude of malfunctions with the turbine generator unit. On December 22, 1961, Southwest had extraction control difficulties with the turbine generator unit. Again, on December 23-24, 1961, the turbine generator unit malfunctioned in that the 60-pound grid valve froze and there was an oil leak. On December 27, 1961, Southwest again had problems with the malfunctioning turbine generator in that work on the governor extraction control was required. Again, on December 28-30, 1961, the turbine generator unit malfunctioned in that the 234-pound and 60-pound extractions were uncontrollable. On January 2, and January 3, 1962, there was a complete inspection and cleaning of the turbine generator unit. Again, on January 8-9, 1962, Southwest had difficulties with the turbine generator unit in that a new upset main spring had to be installed. Again, on January 22, 1962, the turbine generator unit malfunctioned, in that the 60-pound extraction safety disc ruptured. Again, on January 22-23, 1962, Southwest had difficulty with the malfunctioning turbine generator unit in that the 235-pound extraction safety disc ruptured. Again, on January 29, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 60-pound and 235-pound extraction piston cylinders were galled. Again, on January 31, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 235-pound Servo motors were cutting

out and surging. Again, on March 21, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the extraction pistons were scored. Again, on March 26, 1962, and March 28, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 235-pound cylinder scored and piston galled. Again, on March 21, 1962, Southwest had difficulty with the malfunctioning turbine generator unit, in that the 235-pound and 60-pound extraction controls were operating improperly. On April 8-11, 1962, Southwest again had difficulty with the malfunctioning turbine generator unit, which required repair of regulator control block and governor sleeve. Again, on April 11, 1962, Southwest experienced difficulty with the malfunctioning turbine generator unit, which required the replacement of a ruptured disc on the 235-pound line. Again, on July 14, and July 18, 1964, Southwest experienced difficulty with the malfunctioning turbine generator unit, in that the exciter armature coil connection failed. Each of the foregoing mentioned dates the turbine generator unit was actually out of operation, thereby causing the pulp and paper mill of Southwest to be shut down. (See answer to Interrogatory No. 22, TR 63-64).

Southwest in its answers to Interrogatories, which have not been controverted, alleged that Westinghouse negligently manufactured the steam turbine generator unit in the following particulars: that mill cuttings and other foreign materials were not properly removed from the governor control hydraulic system prior to the shipment as a sealed unit from the factory; that mill cuttings and other foreign materials were not removed from the generator control unit system during the flushing procedure conducted by Westinghouse; that Westinghouse was negligent in design in that the governor control hydraulic system did not contain an adequate filtration method or device; that the ends of the armature coils were not properly soldered to the risers from the commutator bars, resulting in physical failure of two of these welded joints during July of 1964. (See answers to Interrogatories Nos. 26 and 27, TR 68; and supplemental answer to Interrogatory No. 27, TR 75-4).

Southwest has also alleged in its answers to Interrogatories, which have not been controverted by Westinghouse, that Westinghouse or its agents negligently made repairs and failed to remedy the defects in the turbine generator unit in the following respects: that they failed to determine the extent of damage in the governor control mechanism that had been caused by foreign material left in the hydraulic system in the Westinghouse factory; that they did not find and remove all of the foreign material after it was first discovered to be present in the hydraulic system by Westinghouse' service engineers; that by polishing out the score marks made on the power pistons and cylinder walls of the control system by the foreign materials, the result was excessive clearances and the consequent binding of the pistons in the cylinders during their normal action. (See answers to Interrogatory No. 25, TR 68.)

It was against this background that on December 17, 1963, Southwest sued Westinghouse alleging, in its final pleadings, in Count One, that Westinghouse negligently manufactured the turbine generator unit so that it failed to function and perform, and that as soon as Southwest informed Westinghouse to that effect, Westinghouse undertook to repair the turbine generator unit but that such repairs were negligently made and failed to remedy the defects caused by Appellee's negligence in the manufacture of the turbine generator unit. In Southwest's supplemental complaint it was alleged that Southwest discovered additional defects in the turbine generator unit and that such defects were in the exciter and were proximately caused by Westinghouse' negligence in the manufacture of the turbine generator unit, and that when Southwest notified Westinghouse of that fact, Westinghouse failed and refused to make the necessary repairs or to remedy such defects. Count Three of Southwest's complaint, which was severed by the lower Court, alleged a conspiracy in violation of Section One of the Sherman Act. In Count Four, Southwest alleged that certain warranties had been made by Westinghouse to Southwest and that they had been breached by Westinghouse.

SPECIFICATION OF ERRORS

1. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count One of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

2. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Appellant's supplemental complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

3. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count Two of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

4. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count Four of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

5. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in its finding that the applicable warranty on the sale of the steam turbine generator unit was the exculpatory warranty of the Appellee.

6. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in finding that there was a meeting of the minds with regard to the warranty set forth in Specification No. 5.

7. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) by finding that by virtue of the limitation in the warranty referred to in Specification No. 5, that the Appellee was not liable to Appellant for damages under any theory set forth in the final pleadings of the Appellant.

8. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in finding that there was no evidence before the Court that the Appellee had failed to perform its affirmative warranty duties of correction and replacement.

9. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that there were no issues of material fact with respect to the matters before the Court for decision.

10. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in granting Appellee's Motion for Partial Summary Judgment as to the damages claimed under the theory of strict liability in tort, because the principles underlying the doctrine of strict liability in tort for defective products were not applicable.

11. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that all damages sought by Appellant were consequential.

12. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that the circumstances of the case at bar did not bring the Appellant within the class of consumers entitled to relief based upon strict liability in tort.

13. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that neither the philosophy nor the theory of the doctrine of strict liability in tort, nor the actual holdings of cases involved support an extension of the doctrine of strict liability in tort to the present facts in determining that all of the parties operated on the assumption that the Appellee's proposal and the Rust Engineering Company letter of intent constituted the contract for sale of the turbine generator unit.

14. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the conduct of the parties could not be reasonably explained on any other basis.

15. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that by every objective test there was an agreement as to the nature of the contract in effect and its terms and conditions and particularly as to the express warranty involved.

16. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the limitation of liability provisions in the Appellant's proposal and form of acknowledgement were sufficient under the *Uniform Commercial Code*, §2-719 to limit the Appellee's liability so as to exclude consequential damages based on breach of contract.

17. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that there was no evidence before the Court that the Appellee failed to perform its obligations under its warranty.

18. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the limitations of liability under Pennsylvania law were valid and enforceable.

19. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the parties to an agreement may contract as to limitation of liability resulting from breach of both express and implied warranties.

20. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that there had been no allegations of unconscionability.

21. The lower Court, in its Opinion of September 7, 1967 (TR 978-1007), in determining that although liability for consequential damages resulting from negligence was not expressly limited in Appellee's form of warranty, erred in finding that the provisions limiting liability to exclude consequential damages were sufficiently broad to limit liability resulting from negligence.

22. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that under the facts in the case at bar there could be no recovery for consequential damages based upon a theory of tort, apart from a contractual duty.

23. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that any remedy for breach of duty of repair under the warranty referred to in Specification No. 5 was similarly limited to repair and replacement of defective materials and workmanship for a period of one year.

24. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the documents constituting the contract between the Appellee and the Appellant with respect to the sale of the turbine generator unit were the proposal of the Appellee and the Rust Engineering Company letter of intent, as confirmed by the Appellee's form of acknowledgement.

25. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the effect of the documents referred to in Specification No. 24 and of the conduct of the parties with respect thereto was to include the Appellee's form of warranty and limitation of liability as part of the agreements of the parties.

26. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the terms of the Appellee's form of warranty and limitation of liability under Pennsylvania law were sufficient to limit Appellee's liabilities so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation and repair of the turbine generator unit.

27. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that there is no separate tort duty, apart from a duty based on contract, to compensate the Appellant for consequential losses which it claims to have suffered.

QUESTIONS PRESENTED FOR REVIEW

The questions involved in this appeal are as follows:

I. Can a court properly grant a motion for summary judgment to the moving party, when the moving party on a motion for summary judgment fails to establish that there are no genuine issues as to material facts?

II. Was there a meeting of the minds of Southwest and Westinghouse on all of the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance?

III. When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, is such an exculpatory clause unconscionable under the *Uniform Commercial Code?*

IV. When the record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, then was it proper for the lower Court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence?

V. Is the granting of a summary judgment proper when the moving party has not shown that it is entitled to a judgment as a matter of law?

VI. Did the lower Court improperly grant Westinghouse' motion for summary judgment based upon the theory of strict liability in tort, when all indications would show that the Supreme Court of the State of Arizona would grant recovery to Southwest in strict liability in tort in the case at bar?

VII. When a seller has not disclaimed express and implied warranties, can the seller effectively disclaim express and implied warranties given by merely restricting the damages and remedies of the buyer without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code?*

SUMMARY OF ARGUMENT

I. A motion for summary judgment cannot be granted when there are genuine issues as to material facts, and the moving party has the heavy burden of proof to show that there are no genuine issues as to any material fact. Even though counsel for the parties may stipulate that there exists no dispute as to any material fact, such a stipulation is obviously inoperative since the lower Court cannot be controlled by agreement of counsel on a question of law, and in fact, the lower Court has the affirmative duty to search the entire record to determine if there are genuine issues as to material facts. Not only must the historic facts be free from controversy, but also there must be no controversy as to the inferences which may be drawn from the historic facts, and when questions of fact are presented as to the nature of a person's conduct, intention, or state of mind, and it is very unusual that a disposition of the case may be made by summary judgment.

II. There was never a meeting of the minds of Southwest and Westinghouse on all the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance. In such a case, when the minds of the contracting parties do not meet and assent to all of the essential terms and conditions contained in an offer and acceptance, then there is still a contract under §2-207(3) of the *Uniform Commercial Code,* when the conduct of the contracting parties recognizes the existence of a contract. The contract between the parties will then consist of those terms upon which the writings of the parties agree, together with any supplementary terms incorporated under the other provisions of the *Uniform Commercial Code.* When an unconscionable exculpatory clause, such as used by Westinghouse in the case at bar, is not brought to the attention of a contracting party, it does not become a part of the contract between the parties. Further, assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse on all the essential terms and conditions contained in the offer by Westinghouse and the acceptance by Southwest, then in that case, the different terms contained in the Southwest

acceptance became a part of the contract between the parties by virtue of §2-207 of the *Uniform Commercial Code.*

III. When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, then such an exculpatory clause is unconscionable under the *Uniform Commercial Code.* Even assuming, arguendo, that the Westinghouse unconscionable exculpatory clause applied, then the unconscionable exculpatory clause does not limit recovery by Southwest when Westinghouse repeatedly failed to adequately correct the defects as promised. Also, the purchase price paid by Southwest to Westinghouse for the steam turbine generator unit was excessively high as a result of a conspiracy by Westinghouse in violation of Section One of the Sherman Act, and as such, the contractual provisions as contended by Westinghouse are unconscionable.

IV. The record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, and it was, therefore, improper for the lower Court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence. Under the law of the State of Arizona, Southwest may recover against Westinghouse on the theory of negligence, because the liability for negligence may co-exist with a buyer's cause of action for breach of warranty.

V. The granting of a motion for summary judgment was improper because Westinghouse had not shown that it was entitled to a summary judgment as a matter of law. Even assuming, arguendo, that the Westinghouse unconscionable exculpatory clause applied to consequential damages, then Westinghouse, as the moving party, had not shown as a matter of law that Southwest is not entitled to recover incidental damages.

VI. The lower Court improperly granted Westinghouse' motion for summary judgment based upon the theory of strict liability

in tort, when all indications show that the Supreme Court of the State of Arizona would grant recovery to Southwest based upon a theory of strict liability in tort, since Arizona has adopted the Doctrine of Strict Liability in Tort.

VII. Westinghouse has not disclaimed certain express and implied warranties given to Southwest, and therefore, Westinghouse cannot effectively disclaim the express and implied warranties given to Southwest by merely restricting the damages and remedies of Southwest, without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code*. Even assuming arguendo, that the unconscionable exculpatory clause of Westinghouse applies, then Westinghouse has not disclaimed the express and implied warranties given to Southwest and Westinghouse should not be allowed to do so merely by using an inconspicuous unconscionable exculpatory clause limiting the remedies of Southwest.

QUESTION I AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 14, 15, 17, 20, 22, 23, 24 and 25.

ARGUMENT

I. Can a Court Properly Grant a Motion for Summary Judgment to the Moving Party, When the Moving Party on a Motion for Summary Judgment Fails to Establish That There Are No Genuine Issues as to Material Facts?

A. AN AGREEMENT BY COUNSEL THAT THERE EXISTS NO GENUINE ISSUE TO ANY MATERIAL FACTS IS INOPERATIVE, AND THE COURT CANNOT BASE THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT ON SUCH AN AGREEMENT, BECAUSE THE LOWER COURT CANNOT BE CONTROLLED BY AGREEMENTS OF COUNSEL ON QUESTIONS OF LAW.

As this Court knows, the requirements for the granting of a summary judgment are set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, *show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added)

In the case at bar, the lower Court in its Opinion (TR 979, 984) and in its Order and Judgment (TR 1009) relied upon an agreement between counsel for Southwest Forest Industries and Westinghouse that there was no dispute as to any material issue of fact, and therefore, there being by agreement of counsel no genuine issue as to any material fact, the lower Court entered its order granting Westinghouse' motion for partial summary judgment (TR 984).

The agreement that the lower Court referred to, occurred on August 11, 1967, and stated as follows:

> The Court: And the parties agree that there exists no dispute as to any material fact necessary to decide the legal issues of what constitutes the contract warranty and whether the defendant is liable thereunder for the claimed consequential damages; is that correct?
>
> Mr. Perry: That is correct.
>
> (Appeal Transcript, pp. 229-230)

At first blush, it might appear that this agreement eliminated any material issue of fact to be presented to the tryer of fact. However, reference should be made to the proceedings held before the Court prior to the submission of the motion for summary judgment by Westinghouse. On August 10, 1967, Mr. Perry stated to the Court as follows:

> Counsel has raised the point in two separate motions for summary judgment that consequential damages cannot be recovered in this action, in an action based upon negligence, for the reason that he takes the position that consequential damages are never recoverable in a negligence action; and for the second reason *that he believes the warranty clause, which is the effective clause in this case, has the effect of barring a right to recover in tort. We, of course, resist both of those positions.*
>
> (Appeal Transcript, p. 223) (Emphasis added)

In the case of *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281, 289; 61 L.Ed. 722, 725-26 (1917), the Supreme Court of the United States was dealing with the question of a stipulation by

the parties and the effect of such stipulation upon the court. With regard to the effect of a stipulation, the Supreme Court of the United States stated:

> *If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.* If the stipulation is to be treated as an attempt to agree 'for the purpose only of reviewing the judgment' below, that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. '*The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard*' . . . we treat the stipulation, therefore, as a nullity. (Citations omitted) (Emphasis added)

In the case of *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967), the trial court was faced with a similar problem as in the case at bar, and the court stated as follows:

> *The summary judgment procedure is available only in cases where there is no genuine issue of material fact. Whether or not a genuine issue of material fact exists is a determination for the court, not the parties, and the fact that the parties may have thought there was no material fact in issue is in no way controlling.* 'The fact that both sides moved for summary judgment does not establish that there is no issue of fact and require that judgment be granted for one side or the other.' Neither party, by moving for summary judgment, concedes the truth of the allegations of his adversary other than for purposes of his own motion. A movant may contend that under his theory of the case, no substantial issue of fact exists, while under the adversary's theory factual questions are in issue . . . *Moreover, the party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence.* (Citations omitted) (Emphasis added) (375 F.2d at 673-674)

The trial Court in the *Cram* case relied on depositions which were apparently uncontroverted by counsel; however, the Court of Appeals stated:

> However, it does not necessarily follow that the case can therefore be disposed of by summary judgment. (375 F.2d at 674)

The Court then held:

> *'Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.'*
> (Emphasis added) (Citations omitted) (375 F.2d at 674)

Another case which follows the reasoning in the *Cram* case is that of *Brawner v. Pearl Assurance Company*, 267 F.2d 45 (9th Cir. 1958) wherein the Court stated:

> (1) In this case, this Court is again confronted with the confusion which follows the filing of motions for summary judgment by plaintiff and defendant, respectively. Again it is reiterated that such a situation does not parallel that where both parties file motions for directed verdict. In the latter instance, each party is held to agree that there is no disputed question of fact and that the case is to be decided on the principles of law. *In contrast, by definition, a summary judgment cannot be granted if there be a disputed question of material fact. This determination does not depend upon what either or both parties may have thought about the matter.*
> (Emphasis added) (267 F.2d at 46)

It should also be noted that in the *Brawner* case, *supra*, the United States Court of Appeals for the 9th Circuit held that a motion for summary judgment would not lie unless the defendant could establish by uncontroverted facts that plaintiff suffered no loss whatsoever and that whether plaintiff suffered loss and in what amount constituted a genuine issue of a material fact.

Therefore, it is respectfully submitted that the agreement of counsel that there existed no dispute as to any material fact is inoperative, and as such, the Court cannot base the granting of a motion for summary judgment on such agreement because the Court has the affirmative duty to search the pleadings, depositions, and answers to interrogatories, in order to make a judicial determination that there exists, as a matter of law, no genuine issue as to any material fact before the Court can grant a motion for summary judgment.

B. IN DETERMINING WHETHER OR NOT THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS, NOT ONLY MUST THE HISTORIC FACTS BE FREE FROM CONTROVERSY, BUT THERE MUST ALSO BE NO CONTROVERSY AS TO THE INFERENCES WHICH MAY BE DRAWN FROM THE HISTORIC FACTS, AND THE NON-MOVING PARTY IS ENTITLED TO ALL FAVORABLE INFERENCES WHICH CAN BE DRAWN FROM THE HISTORIC FACTS AND ALL DOUBTS AS TO THE EXISTENCE OF A GENUINE ISSUE AS TO A MATERIAL FACT MUST BE RESOLVED AGAINST THE PARTY MOVING FOR A SUMMARY JUDGMENT.

Even though there is no dispute as to the existence of a contract between Westinghouse and Southwest, and even though there may be no dispute as to the historic facts which comprise the various documents which comprise the contract, there are material issues of fact as to the inferences which may be drawn from the various documents in the case at bar.

In the case of *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965), the Court stated:

> The fact that both sides move for summary judgment does not establish that there is no issue of fact and require that judgment be granted for one side or the other. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted... In order to grant a motion for summary judgment it must be shown 'that there is no genuine issue as to any material fact.' ... *Not merely must the historic facts be free of controversy, but also there must be no controversy as to the inferences which may be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under*

such circumstances the case is not one to be decided on a motion for summary judgment. (Emphasis added) (354 F.2d at 216)

In the case at bar, even though we do not have cross motions for summary judgment, it is readily apparent that we have an analogous situation, especially in the light of the arguments advanced by counsel for Southwest and Westinghouse and the various inferences which they attached and argued with reference to the documents in an attempt to show the existence or non-existence of the specific contract between the parties. Even though the parties may have agreed that the historic facts were free of controversy, their argument to the Court conclusively shows that there was a controversy as to the inferences which could be drawn from the historic facts and documents before the Court. For arguments of counsel on the historic documents and the inferences that they draw from them see arguments of counsel set forth in Appendix II.

The Federal Courts have consistently held that questions of fact are presented as to the nature of a person's conduct and intention and that *"sound judicial administration strongly suggests that a Court should not attempt to reconstruct the intent of the parties in a complicated fact situation before they have had an opportunity to present evidence on that issue before the fact-tryer"*, (emphasis added) and that under such circumstances, the facts should be fully explored at a trial precluding summary judgment. See *Rosenfeld v. Schweitzer Corporation,* 251 F.Supp. 758, 763 (S.D.N.Y. 1966).

The case of *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966) was an action brought under the Miller Act to recover on behalf of the subcontractor's supplier against the subcontractor, prime contractor, and prime contractor's surety. The Court of Appeals reversed the District Court's granting of summary judgment against defendants, holding that certain fact issues existed such as to preclude summary judgment. There is an interesting statement concerning summary judgment contained in

this case, which does an excellent job of summing up Southwest's position in the case at bar:

> Summary judgment has been described as a 'drastic remedy' . . . It should be rendered, upon motion, only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' . . . *If, viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the party opposing the motion, we can see that there is no genuine issue of fact, then the granting of a motion for summary judgment should be sustained. When an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment.* . . . It is important and ordinarily essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue.
> (Citations omitted) (Emphasis added) (355 F.2d at 438-439)

The Court found to exist certain issues of material fact in the form of possible inferences which could be drawn from the evidentiary facts, and stated in this regard:

> Under the peculiar circumstances, we believe that the trial court may have derived aid from observation of the demeanor and attitude of witnesses, particularly under cross-examination. As our court has written,
>
> > 'If the district court were permitted to weigh the evidence and resolve issues in making its findings of fact and conclusions of law, we could properly find from the evidence here that the findings and conclusions should be sustained. It is necessary to determine, however, whether viewing the evidence as a whole and the inferences to be drawn therefrom in the light most favorable to the (party opposing the motion for summary judgment) it may be said that there is no genuine issue of fact[11] mindful also of the fact that there is no express finding to that effect by the district court (as there was no such express finding by the trial court in the case at

bar)' United States ex rel. Austin v. Western Elec. Co., supra, 337 F.2d, at 572.

(11) *An issue of fact may arise from inferences to be drawn from all evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment* ... (Citation omitted) (Emphasis added) (355 F.2d at 440)

The case of *United States v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964) involved an action by a subcontractor and his surety under the Miller Act against a prime contractor. The District Court entered summary judgment for defendants, from which plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit held that the pleadings, affidavits, and answers to interrogatories presented genuine issues of fact as to whether, for purposes of the right of defendants to invoke the Statute of Limitations, any work had been performed on or after a certain date. Here, the District Court weighed the evidence rather than determining whether a genuine issue of material fact existed. This case stands for the proposition that when a motion for summary judgment is filed, the Court is to determine whether a genuine issue of material fact exists, and is not to substitute itself as the trier of fact as it might where fact isues are actually tried to the Court instead of a jury. The Opinion states:

> The findings of fact recite that 'having considered all of the evidence and having examined all of the proofs offered by the respective parties' the court makes its findings of fact —a form customarily followed where the court has weighed the evidence and resolved the issues. Rule 52(a), by amendment effective March 19, 1948, specifically provides that, 'Findings of fact and conclusions of law are unnecessary on decisions of motions' for summary judgment under Rule 56. We recognize, however, that findings of fact and conclusions of law are frequently used in granting motions for summary judgment. ... findings of fact, 'while unnecessary,' sometimes 'provide a handy summary.' On the other hand, 'all too often a set of unnecessary findings of fact is the telltale flag that points the way to a discovery that summary judgment should not have been granted.'

> If the district court were permitted to weigh the evidence and resolve issues in making its findings of fact and conclusions of law, we could properly find from the evidence here that the findings and conclusions should be sustained. It is necessary to determine, however, whether viewing the evidence as a whole and the inferences to be drawn therefrom in the light most favorable to the plaintiff it may be said that there is no genuine issue of fact, mindful also of the fact that there is no express finding to that effect, by the district court. (Citation omitted) (337 F.2d at 572)

Therefore, it is respectfully submitted that in the case at bar, even though the historic facts may be free from controversy, the record, as shown by arguments of counsel, affirmatively shows that there is a substantial controversy as to the inferences which are drawn from the historic facts, and since the non-moving party is entitled to all favorable inferences which can be drawn from the historic facts, and since all doubt as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment, it is submitted that the lower Court improperly granted the Appellee's motion for summary judgment.

In conclusion, it is submitted that a motion for summary judgment cannot be granted when there are genuine issues as to material facts, and the moving party has the heavy burden of proving that there are no genuine issues as to material facts. In the case at bar, even though counsel may have stipulated that there existed no dispute as to any material fact, such a stipulation was obviously inoperative since the trial Court cannot be controlled by agreement of counsel on a subsidiary question of law, and in fact, the trial Court has the affirmative duty to search the entire record to determine if there are genuine issues as to material facts. In determining whether or not a summary judgment should lie, not only must the historic facts be free from controversy, but also there must be no controversy as to the inferences which may be drawn from the historic facts and questions of fact were presented in the case at bar because there was a genuine dispute as to the inferences which were drawn from historic facts so as to preclude the granting of a

motion for summary judgment. Also, questions of fact are presented when the determination of the nature of a party's conduct, its intent, or state of mind was taken into consideration by the trial Court.

Therefore, it is respectfully submitted that the trial Court's granting of the Appellee's motion for partial summary judgment was improper and should be reversed by this Court.

QUESTION II AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

ARGUMENT

II. Was There a Meeting of the Minds of Southwest and Westinghouse on All of the Terms and Conditions Set Forth in the Westinghouse Offer and the Southwest Acceptance?

A. WHEN THE MINDS OF THE CONTRACTING PARTIES DID NOT MEET AND ASSENT TO ALL OF THE ESSENTIAL TERMS AND CONDITIONS CONTAINED IN AN OFFER AND AN ACCEPTANCE, THERE IS STILL A CONTRACT UNDER §2-207(3) OF THE UNIFORM COMMERCIAL CODE WHEN THE CONDUCT OF THE CONTRACTING PARTIES RECOGNIZES THE EXISTENCE OF A CONTRACT.

On May 18, 1960, Westinghouse sent to Rust Engineering Company a letter offering to sell to Southwest a 25,000 kw turbine generator unit at a price of $1,137,000.00 (Ex. DDD). On the front page of Exhibit DDD, Westinghouse expresses the virtues of the high reliability of their steam turbine generator unit by stating:

> In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, *we direct your attention to several Westinghouse features that contribute to the high reliability of our unit.* We urge these features be considered in your evaluation. (Emphasis added)

However, what Westinghouse giveth it also taketh away, for on the back page of Exhibit DDD in inconspicuously small type, Westinghouse set forth certain statements, among which are the following:

> WARRANTY—Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects

in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

* * *

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On July 6, 1960, Southwest, by its purchase order (Ex. 2-A) accepted Westinghouse' offer to sell a 25,000 kw turbine generator unit.

On the face of Southwest's purchase order (Ex. 2-A) it is stated in bold type:

IMPORTANT INSTRUCTIONS

Directly underneath the words "Important Instructions" it is stated:

Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all of the terms and conditions of this order by the vendor.

On the reverse side of the Southwest purchase order, it is stated in bold, conspicuous type:

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

Following this, there are twelve important terms and conditions, of which we are concerned with Nos. 2 and 12. Sub-paragraph 2 states as follows:

(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor

by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. *The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.*
(Emphasis added)

Sub-paragraph 12 of the terms and conditions states:

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. *In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.*
(Emphasis added)

Southwest's original purchase order was accepted by Westinghouse by Mr. J. J. Rice. He then placed upon the purchase order the following notation:

In referring to this order please use this number as a reference.

Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.

Mr. Rice crossed out the word "attached" and then did not transmit to either Southwest or Rust the W. E. Corp. form of acknowledgement. (See deposition of John J. Rice). Thereupon, subsequent to July 6, 1960, Westinghouse shipped to Southwest the steam turbine generator pursuant to the Southwest purchase order. It should be noted that subsequent purchase orders were sent by Southwest to Westinghouse on July 19, 1960, November 9, 1960, December 1, 1960, and January 20, 1961, on the same purchase order form all of which were accepted by Westinghouse.

In the case at bar, it is readily apparent, and we are sure that Westinghouse must admit, that a contract was in existence between the parties.

Therefore, it is readily apparent that the question is, upon which claimed terms and conditions of the documents did the minds of the parties meet? Did they meet on the terms and conditions found in the Southwest purchase order, or did they meet on the terms and conditions of Westinghouse' form of offer? What is the fact?

In the case of *Euclid Engineering Corporation v. Illinois Power Company,* 78 Ill.App.2d 235, 223 N.E.2d 409 (1967) the Court held that §2-204 of the *UCC* still required an agreement or meeting of the minds between the negotiating parties, and with respect thereto, the Court stated at p. 413:

> The law is well settled that in order for a contract to come into being, there must be a meeting of minds of the parties to the contract. . . . We believe the rule to be well stated in I.L.P., Vol. 12, Contracts, §31, as follows:
>
> > One of the essential elements for the formation of a contract, other than a contract implied in law or quasi contract, is a manifestation of assent by the parties to the terms thereof. It is essential that both parties assent to the same thing in the same sense and that their minds meet on the essential terms and conditions.
>
> The Uniform Commercial Code has not made any change in the basic law. (Citations omitted)

It is apparent in the case at bar that the minds of the parties did not meet on all of the essential terms and conditions set forth in their respective documents. In such a case as this, the authors of the *Uniform Commercial Code* had great foresight, and the *UCC* steps in over the common law to fill this void by declaring that there is still a contract between the parties.

In §2-207, subsection (3) of the *UCC,* it is stated:

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. *In such case the terms of the particular contract consist of those terms on which the writings of the par-*

> *ties agree, together with any supplementary terms incorporated under any other provisions of this Act.*
> (Emphasis added)

In the case at bar, there can be no argument by either Southwest or Westinghouse that the conduct by both parties recognized the existence of a contract, because in fact, the steam turbine generator unit was actually delivered by Westinghouse to Southwest and Southwest paid the entire purchase price for the unit, except for the sum of $57,082.20 which, according to Westinghouse, is still owed by Southwest, as alleged in the counterclaim of the Appellee.

However, it is respectfully submitted that the minds of the parties in the case at bar did not meet and assent to all of the essential terms contained in the purchase order of Southwest and the offer of Westinghouse. In such a case as this, it is respectfully submitted that the operation of Subsection (3) of §2-207 is intended to apply, and in this event the conflicting terms and conditions in the documents upon which the minds of the parties did not agree are excluded and the contract between the parties becomes only those portions of the terms and conditions upon which the writings of the parties agree and any supplemental terms incorporated under any other provisions of the *UCC*.

B. AN UNCONSCIONABLE EXCULPATORY CLAUSE, WHICH IS NOT BROUGHT TO THE ATTENTION OF A CONTRACTING PARTY, DOES NOT BECOME A PART OF THE CONTRACT BETWEEN THE PARTIES.

The courts have consistently held that an unconscionable exculpatory clause, such as used by Westinghouse in the case at bar, must be brought to the attention of the parties. In 3 Bender's *UCC Service*, Section 4.08(2), p. 4-102, the authors state:

> Another area where courts have been active to construe provisions strictly against their authors, or where the harshness of the results has been an object of judicial avoidance is that of clauses limiting the remedy which either party, but usually the buyer, may have. The most commonplace is the clause limiting an injured buyer to a repair or replacement of

> defective parts. After several fruitless attempts at repair, resort to legal sanction may be necessary. *Courts have stated that such terms did not become a part of the bargain because not brought to the attention of the parties, or that failure to repair meant that the remedy was not effective and therefore allowed the injured party to assert any other remedy available at law.* Section 2-719(2) now provides that where resort to a remedy set forth in the agreement fails of its essential purpose, the party shall have any remedy provided under the Code. (Emphasis added)

In the case at bar, not only has the remedy of repair failed in its essential purpose, but in addition thereto, notice of the exculpatory clause was not brought home to Southwest.

In the deposition of John J. Rice, Project Correspondent for Westinghouse, dated August 5, 1967, the following questions were asked and answered on p. 15 and p. 16:

> Q. Did you ever discuss with Mr. Fritschi the terms and conditions of warranty?
>
> A. No, sir.
>
> Q. *Did you ever discuss with anyone from Rust Engineering, or from Southwest Forest Industries, the terms and conditions of warranty?*
>
> A. *No, sir.* (Emphasis added)

At the deposition of John J. Sherman, Sales Engineer for Westinghouse, on August 4, 1967, the following questions were asked and answered on pp. 8 and 9:

> Q. At any time from the time you made your proposal in writing to Rust and up until the time the letter of intention was received by Westinghouse, did you have any discussions with Rust personnel which were directed to the terms and conditions of any warranties to accompany the sale?
>
> A. Other than the terms and conditions?
>
> MR. FLYNN: If you remember.
>
> A. I was going to say the only thing that I could even tell you that I remember is the terms and conditions as outlined in a quotational letter on the back of the Westinghouse standard form, the only thing I have any reference to whatso-

ever, and only because that is standard. We did not discuss it in detail at all.

Q. *Did you at any time ever discuss in detail and with any degree of specificity the terms and conditions of any warranties in the sale of this turbine generator with Rust people?*

A. *None that I can remember.*

Q. *Did you ever have any discussion with any person from Southwest Forest Industries about the terms and conditions of warranties?*

A. To my knowledge, I never had any discussion with Southwest Forest Industries personnel directly.
(Emphasis added)

For cases allowing recovery even though repair and replacement was set forth as the exclusive remedy available, see *Jarnot v. Ford Motor Co.*, 191 Pa. 422, 156 A.2d 568 (1959); *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145 (1965).

Therefore, it is respectfully submitted that since the unconscionable exculpatory clause contained in the Westinghouse offer was not brought to the attention, as required by the *Uniform Commercial Code*, of Southwest or Rust, then in that case, the terms of the unconscionable exculpatory clause did not become a part of the contract, and as such, Southwest is entitled to assert against Westinghouse any other remedy available at law.

C. ASSUMING, ARGUENDO, THAT THERE WAS A MEETING OF THE MINDS BY SOUTHWEST AND WESTINGHOUSE ON ALL OF THE ESSENTIAL TERMS AND CONDITIONS CONTAINED IN THE OFFER BY WESTINGHOUSE AND THE ACCEPTANCE BY SOUTHWEST, THEN IN THAT CASE, THE DIFFERENT TERMS CONTAINED IN THE SOUTHWEST ACCEPTANCE BECAME PART OF THE CONTRACT BETWEEN THE PARTIES.

The *Uniform Commercial Code*, Article II §2-207 brings about a substantial change in the contract law of any state in which the Code has been adopted, as it has in Pennsylvania. Under pre-Code law, a responsive document which differed from or added to the terms of an offer in general could not be an acceptance prior to the adoption of the *UCC*. However, since the adoption of §2-207 of the *UCC*, an acceptance of an offer is effective even though it states *different terms* than the original offer. At this time we feel

it is important to set forth §2-207 of the *UCC* in its entirety for analysis by the Court. Section 2-207 states:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states *terms additional to* or *different from* those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The *additional terms* are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. (Emphasis added)

The authors of the *Uniform Commercial Code,* in their precise and deliberate wording of §2-207 make an important distinction between *"different terms"* and *"additional terms"*. This is seen in Sub-section (1) of §2-207 wherein it is provided that an acceptance is effective even though it may state terms additional to *". . . or different from . . ."* those agreed upon. However, in Subsection (2) of §2-207, the authors limit the inclusion of "additional terms" by setting forth certain criteria which must be met before they shall be included in the contract between the parties.

This distinction is noted by Mr. Duesenberg and Prof. King in 3 Bender's *Uniform Commercial Code Service* §3.03(1), p. 3-28,

wherein they discuss and define "different" and "additional" terms, stating:

> The distinction between additional and different, as can be seen from the preceding illustration, would be crucial to the disposition of the case. Almost any situation where both parties have clauses addressed to a given subject area, but where they are different, is ripe for the type conflict these two terms of Section 2-207 suggest. *To avoid the section's getting bogged down in considerable wasteful litigation, and in view of the history of the section's drafting, wherever parties have covered the same provision, though in different language, the conflicting terms should be regarded as different, not additional.* Otherwise, it would seem that the impact of Subsection (2) with regard to 'additional', and indeed, the objective of the section to visit the consequences of an ambiguity on the party inserting it—the offeree—will be frustrated. Such a construction would also serve to minimize the objection to the section that it takes from an offeror the ability to retain control over the terms of his offer. (Emphasis added)

In the case at bar, the warranties and the obligation for breach thereof, are at odds because one of the Southwest warranties provides that the vendor warrants the proper quality, character, adequacy, suitability and workmanship of the materials, and that Westinghouse shall indemnify Southwest against all loss or damage arising from any defect in the materials furnished by Westinghouse. Whereas, the Westinghouse warranty and obligation therefrom provides that Westinghouse shall correct any defect or defects in workmanship or material which may develop during the period of one year by replacement or repair and that such correction shall constitute a fulfillment of all Westinghouse liabilities and further, that Westinghouse shall not be liable for consequential damages.

This construction is also consistent with the very terms of the Southwest purchase order, since Southwest informed Westinghouse that any shipment and/or delivery of the steam turbine generator unit by them constituted an unqualified acceptance of all of the terms and conditions of the Southwest purchase order.

Therefore, it is respectfully submitted that since both documents, by their terms, are talking of and discussing the same provision, although in different language, then the conflicting terms are "different" and not "additional" terms; and, therefore, the different terms contained in the Southwest purchase order become, pursuant to §2-207(1) of the *UCC,* part of the contract between the parties, thereby eliminating the warranty and liability for breach of warranty provided in the Westinghouse terms and conditions.

In conclusion, it is submitted there was never an assent or a meeting of the minds of Southwest and Westinghouse on all the essential terms and conditions contained in the offer and acceptance, and therefore, since the conduct by the parties themselves recognized the existence of a contract, then there was a contract under the *Uniform Commercial Code.* However, such a contract would only consist of the terms and conditions on which the documents of the parties agree, together with any supplemental terms incorporated under any other provisions of the *Uniform Commercial Code.* It is further submitted that since Westinghouse never discussed with Southwest or Rust the terms and conditions of their unconscionable exculpatory clause, that such unconscionable exculpatory clause did not become a part of the contract because it was not brought to the attention of Southwest or Rust. It is further submitted that, assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse on all of the essential terms and conditions contained in the offer of Westinghouse and the acceptance by Southwest, then the different terms contained in the Southwest acceptance became a part of the contract between the parties, so as to allow Southwest to recover from Westinghouse any and all damages, including consequential damages, which arose by virtue of the breach of the express and implied warranties by Westinghouse.

QUESTION III AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

ARGUMENT

III. When an Unconscionable Exculpatory Clause, Which Was Not Brought to the Attention of a Party, Fails in Its Essential Purpose and Operates to Deprive the Party of a Substantial Value of the Bargain, Is Such an Exculpatory Clause Unconscionable Under the Uniform Commercial Code?

A. EVEN ASSUMING, ARGUENDO, THAT THE WESTINGHOUSE UNCONSCIONABLE EXCULPATORY CLAUSE APPLIES, THE UNCONSCIONABLE EXCULPATORY CLAUSE DOES NOT LIMIT RECOVERY BY SOUTHWEST WHEN WESTINGHOUSE REPEATEDLY FAILED TO ADEQUATELY CORRECT THE DEFECTS AS PROMISED.

The lower Court, in its Opinion (TR 983) has stated that there have been no allegations of unconscionability. However, this finding by the Court is unfounded and unsupported by the record.

In the Appellant's memorandum filed with the Court on August 11, 1967, it is stated at p. 9 thereof (TR 1022):

> Uniform Commercial Code § 2-719 expressly provides that limitations of liability which are 'unconscionable' are invalid. Under the circumstances of this case, where the parties knew that the turbine-generator was to be the sole source of power for a paper mill, and stressed its reliability and adequacy for that purpose, and where the parties knew that such generators were only available from two sources within the United States, a limitation of liability to parts replacement will be 'unconscionable.' We submit that under no construction of the applicable provisions of the Uniform Commercial Code, can the disclaimer relied upon be effective.

Counsel for the Appellee, in its oral argument to the Court on August 11, 1967, also placed the issue of unconscionability before the Court. Mr. Ulrich stated:

> . . . *consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable,* limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damage where the loss is commercial is not, and in addi-

> tion, *if your Honor please, this is not an unconscionable situation,* this is not a matter between a consumer and an individual car owner going down and he has got a packet inside the glove compartment of his car indicating somehow that he has a warranty, that doesn't make any sense to anybody. This is a negotiation between an engineering firm, one of the largest in the world, thoroughly knowledgeable and engaged in this again and again and again between Westinghouse Electric Corporation, which Mr. Ruyak admits that he is familiar with the standard terms and conditions of the Westinghouse warranties, and he knows what they are, and a man or an organization of which he is a part with a responsibility to obtain satisfactory warranties in this case, who in their original request for quotation expressly drafted a paragraph, Guarantee replacement of parts for a period of one year unsuited for the purpose to which we proposed and which is in conformity, and we limited ourselves to consequential damages in that matter pursuant to Section 2-719. This goes back as the court said, this was a particular order for a particular design by a firm knowledgeable, Rust Engineering Company, as to what they could expect and could obtain. This isn't the question of the unfairness or unconscionable situation to the individual single one man consumer down on the street buying from the shelf or buying a car. He has no position to negotiate. *He can't do anything about it. He either buys the car or he can't get one, and that's not this situation.* (Emphasis added)
> (Appeal Transcript, pp. 255-256)

Mr. Ulrich, in his argument to the Court with regard to unconscionability, and his analogy with a single individual purchasing a car, has hit the issue of unconscionability directly on the head. As he stated:

> He has no postion to negotiate. He can't do anything about it. He either buys the car or he can't get one, and that's not this situation. (Appeal Transcript, p. 256)

However, it so happens that this is exactly the situation that Southwest has found itself in with regard to its dealings with

Westinghouse. If the documents constituting the contract between Westinghouse and Southwest are as Westinghouse would contend, then we have exactly the same situation because: (1) there are only two suppliers of a turbine-generator unit, Westinghouse and General Electric Corporation (see Deposition of Carl E. Rodenburg, p. 20); (2) adopting the view of Westinghouse in the litigation at hand, Southwest is in no position whatsoever to negotiate with Westinghouse; (3) there is nothing Southwest can do about it; and (4) Southwest either buys the turbine-generator unit on the terms and conditions set by Westinghouse or else they cannot get one. This in effect is exactly the same situation that Southwest is in if the Court holds that the contract which existed between the parties is the contract provided by Westinghouse with their unconscionable, exculpatory clauses with regard to liability.

Therefore, it is apparent that the issue of unconscionability of the Westinghouse exculpatory clause was properly raised before the lower Court. Also, it should be noted by the Court that Rule 15(b) of the *Federal Rules of Civil Procedure* specifically provides that the issue of unconscionability was raised, as it states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

The test applied to determine whether or not a contract or a clause therein is unconscionable is set forth in Article II §2-302 of the *UCC*, as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) *When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.* (Emphasis Added)

The unconscionable exculpatory clause (Ex. DDD) provided by Westinghouse in the case at bar, states as follows:

> Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement, f.o.b., factory of the defective part or parts, and *such correction* shall constitute a fulfillment of all Westinghouse's liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

It should be noted that the unconscionable exculpatory clause of Westinghouse specifically provides that "such correction shall constitute a fulfillment of all Westinghouse's liabilities." By the use of the words, "such correction" it must be deemed to mean that Westinghouse must first provide the proper correction in a non-negligent and workmanship-like manner before it can exculpate itself from liability. In the case of *Gore v. Sindelar,* 74 N.E.2d 414 (Ct. App. Ohio, 1947), the court stated the following with regard to the seller's obligation to do work in a workmanship-like manner at page 416:

> When a contract to install a machine is entered into, it needs no citation of authority in support of the rule that an agreement to do such work in a workman-like manner is an implied provision of the contract if it is not otherwise provided.

In the case at bar Southwest has alleged that Westinghouse negligently manufactured a turbine generator unit so that it failed to function and perform and that when Southwest notified Westinghouse to that effect, Westinghouse undertook to repair same but such repairs were negligently made and failed to remedy the defects caused by Westinghouse's negligence in the manufacture of said equipment. There is nothing in the record at this stage to show that Westinghouse properly, without negligence, and in a good workmanship-like manner corrected any defect or defects in the turbine generator unit but the record is to the contrary. Therefore,

it is apparent that Section 2-719(2) of the *Uniform Commercial Code* which states: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act" must appropriately come into effect in this situation because the circumstances and facts show that this clause has failed in its essential purpose and operates to deprive Southwest of a substantial value of the bargain if its is properly found by the trier of fact that the unconscionable Westinghouse's exculpatory clause applies in this case.

The comments to Section 2-719 of the UCC are very important to the understanding of Section 2-302, wherein it is stated:

> *However, it is of the very essence of a sales contract that at least minimum adequate remedies be available.* If the parties intend to conclude a contract for sale within this Article, they must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. *Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.* (Emphasis added)

The whole purpose of Section 2-302, 2-719 of the *UCC* is to allow a court not to enforce an unconscionable bargain, to strike a clause which is deemed to be unconscionable, and to enforce the contract as it reads after the expulsion, or so to limit the application of the condemned term as to avoid any unconscionable result.

In 3 Bender's *UCC Service* §14.09(3), at 14-67, the authors state the following with regard to the minimum remedies which must be available to a buyer in a sales contract:

> There must be some *minimum* type of remedy available. If the exclusive remedy provided for fails in some respect to provide adequate relief then it must be deemed an unconscion-

able clause and be stricken from the contract. In such an event, the ordinary remedies provided by the Code in all of its provisions would be available to the aggrieved party. Even though the particular exclusionary clause may be deemed fair and reasonable, if surrounding circumstances cause it to fail in its purpose or as the Comments state "operate to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." (2)

(2) *ibid. E.g. if the exclusive remedy or repair fails, all of the Code remedies become available.*

The following cases deal with situations where the remedies provided for by the seller failed in their essential purpose.

In the Pennsylvania case of *Jarnot v. Ford Motor Company,* 191 Pa. Super. 422, 156 A.2d 568 (1959) (overruled on another point in 422 Pa. 383, 221 A.2d 320 at 325 (1966)), the contract of sale stated as follows:

> The Ford Motor Company Warrants all such parts of new automobiles, trucks and chassis, except tires, for a period of ninety (90) days from the date of original delivery to the purchaser of each new vehicle or before such vehicle has been driven 4,000 miles, whichever event shall first occur, as shall, under normal use and service, appear to it to have been defective in workmanship or material. *This warranty shall be limited to shipment to the purchaser without charge except for transportation of the part or parts intended to replace those acknowledged by the Ford Motor Company to be defective.* (Emphasis added) (156 A.2d at 571)

The facts show that the plaintiff purchased a Ford tractor and cab for $4,973.00 and that, within 90 days, the tractor was destroyed when an essential part of the steering mechanism—the king pin—had broken. The trailer could not be repaired and it cost $1,700.00 to repair the tractor. The plaintiff was awarded $4,800.00 for the value of the truck when destroyed, plus the cost of repairing the tractor. The court in its decision noted that the warranty applied exclusively to the replacement of a defective part, however, the court stated that this had no bearing on the question of the liability of Ford Motor Company where the failure of a defective part resulted in damage covered by another and distinct

implied warranty of merchantability and fitness for the intended use of the vehicle. The court also acknowledged that in Pennsylvania a provision in a contract pertaining to a sale that the contract contained all of the agreements between the parties did not preclude an implied warranty of merchantability.

In the case of *Cox Motor Car Company v. Castle,* 402 S.W.2d 429 (Ct. App. Ky., 1966), the purchaser of a truck brought an action against a dealer who sold him a new Chevrolet truck. The facts show that the truck had a shimmy and that the automobile dealer could not fix it and simply refused to recognize that there was anything defective with regard to the truck and tried to wash his hands of the whole affair. The exculpatory clause involved stated:

> Dealer warrants each new Chevrolet motor vehicle and chassis * * * sold by Dealer to be free from defects in material and workmanship under normal use and service, *Dealer's obligation under this warranty being limited to making good any part or parts thereof which shall,* within ninety days after delivery of such vehicle or chassis to the original purchaser or before such vehicle or chassis has been driven 4,000 miles, whichever event shall first occur, be returned to Dealer at Dealer's place of business and which Dealer's examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties, expressed or implied,* . . . (Emphasis added) (402 S.W.2d at 430)

The court basing its decision on Sections 2-316 and 2-719 of the *UCC* held:

> A breach having been established, *it is obvious that the contract did not contemplate that the remedy shall be by suit for specific performance of the agreement to replace the defective parts.* Clearly, the contract envisions damage in the form of monetary cost for such replacement. The trouble is that in the instant case the buyer did not know and could not reasonably be expected to know what parts were causing the shimmy. The seller, who was in the best position to identify the offending parts, simply refused to recognize that there was any defect and tried to wash his hands of the whole thing. Under those

> circumstances we think that the whole truck properly may be considered one big defective part, and the measure of damages properly would be the cost of replacing the truck with one not defective, which would be the same as the difference in market value. (Emphasis added and supplied) (402 S.W.2d at 431)

In the case at bar, we are faced with a very similar situation where Westinghouse undertook to repair but the repairs were negligently made and failed to remedy the defects, caused by Westinghouse's negligence in the manufacture of the equipment.

In the case of *Seely v. White Motor Company,* 63 Cal.2d 9, 403 P.2d 145, (1965), upon which Westinghouse has relied very strongly, involved the purchase order signed by plaintiff which stated:

> The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, *its obligation under the warranty being limited to making good at its factory any part or parts thereof* . . . (Emphasis added) (403 P.2d at 148)

The Supreme Court of California in rejecting the defendant's contentions, held the defendant liable and stated:

> *Defendant contends that its limitation of its obligation to repair and replacement, and its statement that its warranty is expressly in lieu of all other warranties, express or implied, are sufficient to operate as a disclaimer of responsibility in damages for breach of warranty. This contention is untenable. When as here, the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach of that promise as a breach of warranty.* (Emphasis added) (403 P.2d at 148)

In the case of *Armco Steel Corp. v. Ford Construction Co.,* 237 Ark. 272, 372 S.W.2d 630 (1963) Ford and Armco entered into a contract where the latter agreed to furnish metal piping, and after the work was finished, tests made by Ford revealed breaks had developed in about 25 joints of the pipes. Thereafter, Armco sued Ford for the balance due on the merchandise ordered and delivered and Ford counterclaimed for alleged damages, upon which Ford

received a judgment against Armco for damages allegedly resulting from Armco's breach of warranty.

Ford's counterclaim set forth four basic counts which consisted of breach of contract, breach of warranty, negligence and fraud. Armco affirmatively pleaded a provision in the contract which stated:

> There are no understandings, terms or conditions not fully expressed herein. There is no implied warranty or condition except an implied warranty of title to and freedom from encumbrance of the products sold hereunder and in respect of products bought by description that they are of merchantable quality. *Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality or workmanship at the time of its delivery, or allow credit therefor at its option. In no event shall Seller be liable for consequential damages or for claims for labor.*
> (Emphasis added) (372 S.W.2d 632)

On appeal, Armco relied upon the aforementioned clause in the contract stating that their only requirement was to replace material to have been defective in quality of workmanship. The Supreme Court of Arkansas had little problem with this contention by stating that at the time the pipe was delivered to Ford it was heavily coated with tar or asphalt so that in all actuality, Ford had no way of detecting whether the pipe was welded, riveted or whether it would be water tight. The main contention of Armco on appeal was that portion of the contract which stated:

> In no event shall Seller be liable for consequential damages . . .

With regard to this, the court stated:

> . . . before appellant (Armco) would be entitled to an instructed verdict, it must show that *all* damages resulting from defective materials furnished, were "consequential damages" that is, damages not recoverable under the implied warranty of fitness for the purpose intended.
> (Emphasis supplied) (372 S.W.2d at 633)

Next, the court considered the major question, as in the case at bar, as to whether consequential damages necessarily included

all damages including direct and forseeable damage and the court stated that the words "consequential damages" were not so inclusive.

Westinghouse has never seriously contended that Southwest did not have the implied warranty of fitness, the implied warranty of merchantability, and the various express warranties made by Westinghouse to Southwest. What Westinghouse is in effect saying is that even though they have not disclaimed their responsibility for these warranties, they have exculpated themselves from any liability whatsoever by their statement that they shall not be liable for consequential damages and their statement that their obligation is to repair and replace defects in workmanship or material even though correction of such defects in workmanship or material may be done in a negligent manner and in a non-workmanlike manner. This position is inconsistent with the purpose and intent of the *Uniform Commercial Code* and, in addition thereto, if Westinghouse's position is found to be correct, then this must constitute an unconscionable contract because Southwest is left without any remedy whatsoever. This position is not and cannot be the law as intended by the *Uniform Commercial Code.*

Therefore, it is respectfully submitted that since Westinghouse negligently manufactured the steam turbine generator unit so that it failed to function and perform properly, and further, that when Westinghouse undertook to repair the same, the repairs were negligently made and failed to remedy the defect caused by Westinghouse' negligence in the manufacture of the unit, Southwest is then entitled to all remedies provided by the *Uniform Commercial Code,* since the facts of the case at bar affirmatively show that the unconscionable exculpatory clause of Westinghouse has failed in its purpose and has operated to deprive Southwest of a substantial value of its bargain, assuming arguendo that there was a meeting of the minds between the parties. Therefore, the lower Court's granting of a summary judgment in favor of Westinghouse was in error.

B. THE PURCHASE PRICE PAID BY SOUTHWEST TO WESTINGHOUSE FOR THE STEAM TURBINE GENERATOR UNIT WAS EXCESSIVELY HIGH AS A RESULT OF A CONSPIRACY BY WESTINGHOUSE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT, AND AS SUCH, THE CONTRACTUAL PROVISIONS AS CONTENDED BY WESTINGHOUSE ARE UNCONSCIONABLE.

In the case at bar, Southwest, in its complaint against Westinghouse, in Count Three (TR 780) has alleged that the purchase price paid for the turbine generator unit purchased by Southwest from Westinghouse exceeded the price which Southwest would have had to pay by at least $250,000 if Westinghouse had not engaged in a conspiracy in unreasonable restraint of interstate trade and commerce in the sale of turbine generator units, in violation of §1 of the *Sherman Act* (15 U.S.C. §1).

In the case of *Central Budget Corp. v. Sanchez,* 53 Misc.2d 620, 279 N.Y.Supp.2d 391 (1967) the Court held that excessively high prices may constitute unconscionable contractual provisions within the meaning of §2-302 of the *UCC.*

Therefore, it is respectfully submitted that the contract as contended by Westinghouse may be unconscionable as a result of the alleged violation of Section 1 of the *Sherman Act* (15 U.S.C. §1), and as such, Southwest was denied the opportunity to present evidence as to its commercial setting.

In conclusion, it is respectfully submitted that the unconscionable exculpatory clause of Westinghouse, which was not brought to the attention of Southwest, failed in its essential purpose and operated to deprive Southwest of a substantial value of its bargain when Westinghouse repeatedly failed to adequately correct the defects as promised. Therefore, such an exculpatory clause is unconscionable under the *Uniform Commercial Code,* and it must give way to the general remedy provisions of the *Uniform Commercial Code.*

QUESTION IV AFFECTING SPECIFICATION OF ERROR 1, 2, 4, 7, 8, 9, 17, 18, 19, 21, 22, 23, 25, 26, and 27.

ARGUMENT

IV. When the Record on Appeal Affirmatively Shows That Westinghouse Was Negligent in the Manufacture and Repair of the Steam Turbine Generator Unit, Then Was It Proper for the Court to Grant Westinghouse' Motion for Summary Judgment Against Southwest on the Theory of Negligence When Southwest Had Established a Prima Facie Case in Negligence?

A. UNDER THE LAW OF ARIZONA, SOUTHWEST MAY RECOVER AGAINST WESTINGHOUSE ON THE THEORY OF NEGLIGENCE BECAUSE THE LIABILITY FOR NEGLIGENCE MAY CO-EXIST WITH A BUYER'S CAUSE OF ACTION FOR BREACH OF WARRANTY.

This portion of the case is to be determined under Arizona law. *Klaxon Co. v, Sentor Elec. Mfg. Co.,* 313 U. S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Maloy v. Taylor,* 86 Ariz. 356, 346 P.2d 1086 (1959).

In Count One of the Appellant's Amended Complaint (TR 777) in ¶VI of Count One (TR 778), it is alleged:

> Defendant negligently manufactured said turbine generator unit so that the same failed to function and perform. As soon as plaintiff ascertained that the equipment was defective, it notified defendant to that effect and defendant undertook to repair the same but such repairs were negligently made and failed to remedy the defects caused by defendant's negligence in the manufacture of such equipment.

With regard to the Appellant's negligence counts, the Court held that there could be no recovery for consequential damages based upon a theory of negligence apart from a contractual duty. (TR 983)

The cases cited by the lower Court for its reasoning are wholly inapplicable to the case at bar. (See an analysis of case law cited by the Court at pp.1056-1074, Transcript of Record)

Therefore, it is respectfully submitted that, if under the law of Arizona, Southwest has stated a claim for relief in negligence, then the motion for summary judgment was improperly granted by the

Court with regard to Counts One and Four of Appellant's complaint, and the Appellant's Supplemental Complaint.

In the case of *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc.*, 201 F.Supp. 191 (E.D.Ohio 1961), the plaintiff brought an action for breach of warranty and for negligence The facts show that the plaintiff purchased from the defendant a generator that would manufacture carbon dioxide. The generator did not operate satisfactorily and leaks occurred in the firing tube of the main boiler of the generator, causing contamination of the carbon dioxide processed by the generator and purchased by the customers of the plaintiff. As a result of the contamination of the carbon dioxide, large quantities of soft drinks bottled by the customers of the plaintiff were spoiled, with the result that numerous claims for damages were made against the plaintiff. The Court determined the issues to be whether the defendant breached express warranties or an implied warranty of fitness of the generator, or whether the defendant was negligent in the manufacture of the generator, and whether the defendant's fault, if any, in one or more of the foregoing respects was the proximate cause of the damage claimed to have been sustained by the plaintiff.

The facts also show that the contract between the plaintiff and defendant contained an express warranty obligating the defendant to make good any defect due to defective material or workmanship which might develop prior to 90 days of actual service, but within one year after the completion date of the erection of the generator. The contract also contained an exculpatory clause, as in the case at bar, which stated:

> Gas Atmospheres, Inc. assumes no liability for consequential damages of any kind which result from the use or misuse of the equipment, supplied hereunder, by the Purchaser, his employees or others. (201 F.Supp. at 198)

With regard to the plaintiff's claim in negligence, which was based upon the same facts as the plaintiff's claim for breach of warranty, the Court held that the exculpatory clause of the contract did not relieve the defendant from liability for its negligence, and stated, at p. 200:

Gas Atmospheres owed Pipe Welding the duty to exercise reasonable care and skill in the manufacture of the generator. . . .

Liability for negligence may co-exist with a buyer's cause of action for breach of warranty or it may exist independently of the latter. Prosser on Torts, 2d Ed., §83, pp. 491-493. A person who undertakes to manufacture an instrumentality for use by others will be held to an expert's knowledge of the arts, materials and processes relating to his product. Harper & James, Law of Torts, §284, p. 1541. The evidence clearly establishes that defendants breached their duty to exercise reasonable care and skill in designing the firing tube of the main boiler. (201 F.Supp. at 200) (Emphasis added)

The case of *Asphaltic Enterprises, Inc., v. Baldwin-Lima-Hamilton Corporation,* 39 F.R.D. 574 (E.D.Pa. 1966), involved a buyer's action against a seller for damages for breach of warranty. The facts show that the plaintiff contracted for the purchase of a machine for manufacturing asphalt and alleged the defendant had breached his express warranty that the machine was free from defective workmanship and material, due to the fact that the machine had not produced any merchantable asphalt.

The contract between the parties contained, as in the case at bar, various exculpatory clauses, one of which stated:

> Seller shall under no circumstances be liable for any expense, indirect or consequential damages in connection with the sale or use of the property or otherwise. Buyer waives any right to damages for breach of warranty in the event of rescission by it. *Seller warrants that the property covered hereby . . . is free from defective workmanship and material provided that any claim arising from defective workmanship and materials must be presented to Seller within six (6) months from the date hereof and upon presentation thereof Seller is obligated only to replace at its factory such parts as may appear to Seller, upon inspection by Seller, to have been defective in workmanship or material.*
> (Emphasis supplied) (39 F.R.D. at 575)

In his brief opposing the defendant's motion for dismissal, the plaintiff made no attempt to assert the contractual grounds necessary for the recovery of consequential damages and he relied entirely upon the law of damages with respect to negligence actions based upon a breach of duty arising from a contractual relationship, drawing his support from the case of *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc., supra.*

At the oral argument the defendant pointed out the absence in plaintiff's complaint of any intimation that he wished to proceed in tort rather than in warranty. The Court had no difficulty whatsoever with the argument posed by the defendant, stating that all that was required of the plaintiff was to place the defendant on notice as to the nature of his claim, which the plaintiff had done. The Court further stated that the plaintiff need not specify his theory of recovery, nor was it necessary that the plaintiff set forth in detail the facts upon which such theory rested, holding that where a party has a sound claim he should recover on it regardless of his counsel's failure to perceive the true basis of the claim.

In the case of *McClure v. Johnson,* 50 Ariz. 76, 69 P.2d 573 (1937), the cause of action arose out of an automobile accident near Phoenix. Prior to the accident the plaintiff, who lived in Missouri, decided to move to California, and Johnson (one of the plaintiffs) learned of this fact and entered into an agreement with the deceased plaintiff whereby Johnson was to pay the decedent $20 for transporting Johnson and his family from Missouri to California. While enroute to California an accident occurred in Arizona and the decedent plaintiff was killed in the accident and the Johnson family was injured.

The question that the Court considered was whether the action was one for breach of contract or for tort.

With regard to this issue, the Court stated the following at p. 578:

> We think a good test to be used in determining whether a pleading sets up a case in contract or in tort may be stated as follows. When an act complained of is a breach of specific terms of the contract, without any reference to legal duties imposed by law upon the relationship created thereby, the

action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty *imposed by law as a result of the contractual relationship between the parties* is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases the remedy is an action ex delicto. As was said in Pecos & N.T.Ry.Co. v. Amarillo St.Ry.Co. (Tex.Civ.App.) 171 S.W. 1103, 1105:

> If the transaction had its origin in a contract which places the parties in such relation as that in performing or attempting to perform the service promised the wrong is committed, then the breach of the contract is not the gravamen of the action. There may be no technical breach of the letter of the contract; the contract in such case is a mere inducement and should be so pleaded. It induces, causes, creates the conditions or state of things which furnishes the occasion for the wrong. *It is the wrong outside the letter of the contract which is there the gravamen of the suit.*

(Emphasis supplied)

The Court went on to hold that what was imposed upon the decedent was a contractual relationship between the parties, as a result of which the law imposed certain legal duty on the decedent, to-wit, to carry plaintiffs with reasonable care and that in an attempt to carry out this contract, he committed an act which was a breach, not of the contractual duty, but of the legal duty, which act resulted in the injuries complained of by the various plaintiffs. The Court also stated that the obligation of reasonable care in such transportation was not imposed by the contract, but by the law, as a result of the relationship arising out of the contract, and that the remedy for a breach of that obligation was in tort and not in contract.

For other cases holding that duties created by contract, when breached through negligence, give rise to actions *ex delicto,* see:

Siegel v. Struble Bros., Inc., 150 Pa.Super. 343, 28 A.2d 352 (1942); *Eads v. Marks,* 39 Cal.2d 807, 249 P.2d 257 (1952); *Holmes v. Schnoebelen,* 87 N.H. 272, 178 A. 258 (1935); *Whittle v. Miller Lightening Rod Co.,* 110 S.C. 557, 96 S.E. 907 (1918); *Flint & Walling Mfg. Co. v. Beckett.* 167 Ind. 491, 79 N.E. 503 (1906); *Kahler v. Liberty Mut. Ins. Co.,* 204 F.2d 804 (8th Cir. 1953); *Harzfeld's, Inc. v. Otis Elevator Co.,* 114 F.Supp. 480 (W.D.Mo. 1953); *Gore v. Sindelar,* 74 N.E.2d 414 (Ct.App. Ohio 1947); and 52 Am.Jur. *Torts* § 27.

Although involving a common carrier, the case of *Apache Ry. Co. v. Shumway,* 62 Ariz. 359, 158 P.2d 142 (1945), should be noted by the Court because in the *Shumway* case, *supra,* the Supreme Court of Arizona specifically held that "Relief from negligence cannot be contracted away." Although the *Shumway* case, *supra,* is not on all fours, this case is very persuasive that in the event the Supreme Court of the State of Arizona were to decide this question that the Arizona Court would not allow Westinghouse to exculpate itself from its own negligence by a contractual provision.

In the case at bar, there has been no showing by Westinghouse, upon whom the burden rests in a motion for summary judgment, to show that the steam turbine generator unit was not negligently manufactured and that the subsequent repairs performed by Westinghouse's employees were not negligently and carelessly made. However, the record is replete with evidence which shows that the steam turbine generator unit was negligently made and that when Westinghouse undertook to repair the unit, such repairs were negligently made and failed to remedy the defects caused by Westinghouse's negligence in the original manufacture of the equipment. Southwest, in order to make the Court aware of the negligence and negligent repair of Westinghouse, feels it is imperative that the Court be informed of the contents of a few portions of the multitude of depositions which have been taken in this case so that the Court may more fully understand the acts and the conduct of the Appellee, Westinghouse, and its employees. [See, Summary of Depositions, Appendix No. Two]

Therefore, it is respectfully submitted that the record is replete with evidence which affirmatively shows the steam turbine generator unit was negligently made by Westinghouse, and that when Westinghouse undertook to repair the unit, such repairs were negligently made and failed to remedy the defects caused by Westinghouse' negligence in the original manufacture of the equipment. It is further submitted that Southwest may recover against Westinghouse on the theory of negligence, because liability from negligence may co-exist with a cause of action for breach of warranty and as such, the trial Court's granting of a summary judgment against Southwest on the theory of negligence and the granting of the summary judgment should be reversed, thereby allowing Southwest the recovery to which it is entitled.

QUESTION V AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 11, 16, 17, 18, 19, 20, 21, 23, and 26.

ARGUMENT

V. Is the Granting of a Summary Judgment Proper When the Moving Party Has Not Shown That It Is Entitled to a Judgment as a Matter of Law?

A. EVEN ASSUMING, ARGUENDO, THAT THE WESTINGHOUSE UNCONSCIONABLE EXCULPATORY CLAUSE APPLIES TO CONSEQUENTIAL DAMAGES, WESTINGHOUSE, AS THE MOVING PARTY, HAS NOT SHOWN AS A MATTER OF LAW THAT SOUTHWEST IS NOT ENTITLED TO RECOVER INCIDENTAL DAMAGES.

The damages recoverable by an aggreived buyer under the *Uniform Commercial Code (UCC)* are set forth in Article II, §2-715, which states:

> (1) *Incidental damages resulting from seller's breach include* expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and *any other reasonable expense incident to the delay or other breach.*
> (Emphasis added.)
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting

had reason to know and which would not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Although the term "incidental damages" may be a new word of art in the law, this is the same type of damage that was recoverable under the Uniform Sales Act. 3 Bender's *Uniform Commercial Code Service* §14.07(2), at 14-61 states the following with regard to incidental damages:

> They are those which naturally arise from the breach and which are incurred by the buyer in the normal handling of the goods. Again these elements listed in Subsection (1) are not meant to be exclusive but merely explanatory of the type of incidental damage which a buyer can suffer and for which he should be reimbursed. There is no real difference between the Code and the Uniform Sales Act even though the Uniform Sales Act did not contain any specific provisions with regard to incidental damages. The cases under the Uniform Sales Act followed approximately the same line as the Code has adopted, so as a practical matter, the Code has not made a significant change with regard to incidental damages.

Under the *UCC* the test as far as consequential damages are concerned is whether or not the seller at the time of the contract had reason to know of the particular needs or requirements of the buyer. If the seller knew of the particular needs or requirements of the buyer, then in that case he should be liable for any loss that results. See 3 Bender's *Uniform Commercial Code Service* §14.07(2), at 14-61.

The Court, in its Opinion, has stated: "All damages sought by Southwest in this case are consequential damages." (TR 981) However, it should be noted that many of the items of damage sought by Southwest are, in fact, incidental damages.

In the case of *Willred Company v. Westmoreland Metal Mfg. Co.*, 200 F.Supp. 59 (E.D.Pa. 1961), the Court, deciding the case under the *Uniform Commercial Code* as adopted in Pennsylvania, distinguished between consequential and incidental damages which were recoverable by a buyer upon the seller's breach.

The *Willred* case arose out of an action for breach of an exclusive distributorship contract and for late and defective deliveries under the contract. The Court held that the plaintiff was entitled to recover $69,500.75 for breach of the exclusive distributorship contract based entirely upon the profit which the plaintiff would have been able to realize by contract if the contract had been carried out. The Court also held that the plaintiff was entitled to recover incidental damages as defined in Article 2, §2-715. With regard to the incidental damages, the Court held that the plaintiff was entitled to recover for following incidental damages under §2-715 of the *Uniform Commercial Code.*

1. The plaintiff would, upon satisfactory proof, be entitled to damages in the amount of the difference between the cost of its cover and defendant's price to it.

2. The plaintiff's cost of having the defective products repaired, charging defendant with the cost of the work, including incidental expenses as well as direct labor cost including overhead.

3. The plaintiff's cost of materials used in making repairs to correct the defective products.

4. The plaintiff's expenses with regard to travel expenses incurred by its repairmen in the field.

5. The expenses incurred by plaintiff because of the defendant's late delivery of the various products.

6. "Although my attention has not been called to any case in which a buyer has been allowed interest on amounts withheld by a subpurchaser from him because of defects in the goods, I believe that Section 2-714(3) and 2-715 of the Uniform Commercial Code provide for the recovery of such damages if they can be proved. Any plaintiff suing for a balance due from a defendant is entitled to interest from the date of the defendant's refusal to pay, and I see no reason in principal why, in a case like the present, the plaintiff should not be allowed to recover interest on money due but withheld by a third party for varying periods of time, the delay being due to the defendant's breach of contract." (200 F.Supp. at 69)

Therefore, it is respectfully submitted that before the Appellee is entitled to a summary judgment, it must also show, as the moving party, that it is entitled to a judgment as a matter of law and, that the Appellant has sustained no damages whatsoever which are not

recoverable. The Appellee has failed to meet these requirements, because even assuming arguendo that the unconscionable warranty of Westinghouse applies in the case at bar, then the Appellee has not shown as a matter of law that the Appellant is not entitled to recover incidental damages resulting from the Appellee's breach.

The Court in its Order and Judgment (TR 1010) stated:

> There is no evidence before the Court that the defendant had failed to perform its affirmative warranty duties of correction and replacement.

Even though the burden is on the Appellee, Westinghouse, to show that they affirmatively performed their warranty duties, as a moving party on a motion for summary judgment, the evidence of a breach is still in the evidence before the Court. Mr. Baker in his testimony before the Court on the trial of the matter stated that Southwest encountered unusual and unanticipated difficulties in the turbine generator. [See, Testimony of Mr. Baker, Appendix Two]

Also, it should be noted by the Court that the allegations contained in the Appellant's complaint, which allege that Westinghouse was negligent in the manufacture of the equipment, have not been controverted by Appellee, nor have the allegations of the Appellant's complaint alleging that Westinghouse made certain repairs in a negligent manner been controverted by the Appellee as the moving party, upon whom the burden rests in a motion for summary judgment. However, the record is replete with evidence which shows that the Appellee was negligent in the manufacture of the equipment and that when it undertook to repair the turbine generator unit, that in fact, such repairs were negligently made, and in fact failed to remedy the defects caused by the Appellee's negligence in the original manufacture of the equipment. See also the Depositions of Messrs. Paul Kelly, Ralph Willard LeGates, Henry A. Parzick and Raymond E. Baker.

A case involving a similar fact situation as in the case at bar and also involving an unconscionable clause in which the seller attempted to exculpate himself from consequential damages, is the case of *Armco Steel Corp. v. Ford Construction Co.*, 237 Ark. 272, 372 S.W.2d 630 (1963). In this case, Ford and Armco entered into

a contract wherein the latter agreed to furnish some metal piping to Ford. After the pipe had been all laid and the work finished, tests were made by Ford which revealed that the pipe had developed leaks in about 25 joints of such pipe. Thereafter, considerable settlement negotiations were ineffective, and Armco sued Ford for the balance due on the merchandise ordered and delivered, and Ford counterclaimed against Armco for damages. Ford received a judgment against Armco as a direct and proximate result of Armco's breach of warranty.

Ford's counterclaim set forth four basic counts:

(1) Breach of Contract
(2) Breach of Warranty
(3) Negligence
(4) Fraud

All four of Ford's counts basically alleged that the materials furnished by Armco failed to meet the required specifications and Armco affirmatively pleaded a provision in the contract which stated:

> There are no understandings, terms or conditions not fully expressed herein. There is no implied warranty for condition except an implied warranty of title and freedom from encumbrances of the products sold hereunder, and in respect of products bought by description that they are of merchantable quality. *Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality of workmanship at the time of delivery, or allow credit therefor at its option. In no event shall seller be liable for consequential damages or for claims for labor.* (Emphasis added.) (372 S.W.2d at 632)

On appeal, Armco contended and relied upon a clause in the contract which stated that the seller's liability was limited to the obligation to replace material proven to have been defective in quality of workmanship. The Supreme Court of Arkansas had no problem with Armco's contention, and dismissed this contention by stating that at the time the pipe was delivered to Ford it was heavily coated with tar or asphalt so that in all actuality Ford had no way

of detecting whether the pipe was welded or riveted, or whether it would be water tight.

However, the main contention of Armco, as Westinghouse in the case at bar, was that portion of the contract which read:

> In no event shall seller be liable for consequential damages. (372 S.W.2d at 633)

The Supreme Court of Arkansas in meeting Armco's contention head-on, stated:

> . . . Before Appellant would be entitled to an instructed verdict, it must also show that *all* damages resulting from defective materials furnished, were 'consequential damages' — that is, damages not recoverable under the implied warranty of fitness for the purpose intended. After careful consideration we have concluded there is evidence in the record to show Ford did suffer some amount of damages resulting from Armco's breach of warranty regardless of whether such damages are termed consequential damages, direct damages, or foreseeable damages. It is not denied that the pipe leaked, or that Ford suffered a financial loss in trying to correct the defective pipe and in removing the same. It was up to the jury to say whether Ford acted reasonably in failing to detect the defects in the pipe before it was installed. (372 S.W.2d at 633) (Emphasis supplied)

Next, the Court considered the major question to be decided, as in the case at bar, was *"whether 'consequential damages' necessarily include all damages including direct and foreseeable damages."* (Emphasis added.)

The Court in its holding stated:

> We hold the quoted words are not so inclusive, as many authorities indicate. Black's Law Dictionary (4th ed.) defines 'consequential damages' as
>
> 'Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.'
>
> In the case of Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 40 N.W.2d 73, 79 (1949) they had this to say:
>
> > 'The 'consequential' damages referred to in the clause in question are such damages as do not arise directly according to the usual course of things, from the breach

> of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made' (Citing cases.)

In the case of General Talking Pictures v. Shea, 187 Ark. 568, 61 S.W.2d 430, we said that if a disclaimer is effective at all, it will not extend by implication to liabilities which it does not by its express terms cover. There is, of course, no contention of Armco here that its disclaimer covered any particular items of damages. In 17 C.J.S. Contracts, §262 it is stated:

'Contracts of this nature are not favored by the law; they are strictly construed against the party relying on them, and clear and explicit language in the contract is required to absolve a person from such liability.'

5 Corbin, Contracts §1011, in discussing Causation and Foreseeability, states:

> 'Another form in which the present rule is often stated is that damages are recoverable only for injuries that are the natural result of the breach. This seems to have no meaning other than that there was reason to foresee such injury.' (372 S.W.2d at 634)

The Court went on to state that Armco could have reasonably foreseen that a leaky pipe would cause damage to Ford and that a leaky pipe would not be usable, and that it would have to be removed, and that this would be expensive to Ford. Quoting from the previous case of *Main & Co. v. Dearing,* 73 Ark.470, 84 S.W. 640, (1905) the Court went on to state:

> *The purchaser cannot be supposed to buy goods to lay them on a dunghill.* (Emphasis Added.) (372 S.W.2d at 634)

The court went on to state that it would be unreasonable to hold, as it would be in the case at bar:

> *That Armco could warrant its product to be useful in one breath and then in the next breath disclaim all liability if it is unusable.* It is our conclusion that Appellant (Armco) was subject to liability in some amount for a breach of its implied warranty and, therefore, was not entitled to a directed verdict in its favor on Ford's counterclaim.
> (372 S.W.2d at 634)
> (Emphasis added)

In the case at bar, Westinghouse has not shown as a matter of law that all damages sustained by Southwest were consequential damages and in the case at bar, as in the *Armco* case, *supra,* Westinghouse has not effectively excluded or modified the implied warranty of fitness for a particular purpose or the implied warranty of merchantability.

In the *Armco* case, *supra,* as in the case at bar, the only way that Southwest could have discovered defects in the turbine generator as existed were to place the turbine generator in operation and subject it to performance. Only when this was done did it become evident that the turbine generator supplied by Westinghouse was not of merchantable quality nor fit for the purpose intended.

In the lower Court's Opinion (TR 978) it is stated that Southwest was, "Claiming damages by reason of lost time, labor, materials, and loss of business."

In Footnote 2 to the lower Court's Opinion (TR 986), the Court stated that the damages sought by Southwest:

> Include recovery of fixed operating costs for the period of delay in the start-up of the mill caused by difficulties with the turbine generator unit, *the cost of repairs made by Rusk Engineering Company to the turbine generator unit, and additional caustic (used in the paper making process) purchased to offset that loss from the recovery boiler as a result of shut-down of the turbine, together with costs of fixed operating costs and costs of repair relating to the exciter unit.* (Emphasis added)

The lower Court has classified these as "consequential damages" based apparently upon Appellee's Interrogatory No. 22(c) (TR 24), which requested:

> 1. The total dollar value of *consequential damages* caused by the repairs or adjustments which were performed on each date or dates mentioned in answer to Interrogatory No. 22(a) above.
>
> 2. For each interruption, specify in actual dollar values how much of the total *consequential damages* attributed to each interruption is allocated to:
>
> (a) lost time
> (b) lost labor

(c) lost profits
(d) lost materials
(e) other (Emphasis added)

It should be noted that the Appellee in Interrogatory No. 22(c) (TR 24) sought information concerning *"consequential damages"* and not *"incidental damages,"* and therefore, in order to determine the legal meaning of the term "consequential damages" the Court must consider that term as defined in §2-715 of the *UCC* and the case law actually defining the term "consequential damages."

In the case of *Boylston Housing Corporation v. O'Toole,* 321 Mass. 538, 74 N.E.2d 288 (1947) the Court discusses the distinction between "direct" and "consequential" damages with regard to an exculpatory clause which states that the defendant, Otis Elevator Company, "... in any event ... shall not be liable for consequential damages".

The Court stated, with regard to the distinction between "direct" and "consequential" damages, as follows:

> *On the other hand, it is apparent that the agreement that the defendant shall not be liable for consequential damages is not to be interpreted as meaning that the defendant shall not be liable for any damages whatsoever.... The natural interpretation of 'consequential damages' as used in the contract is that it does not refer to damages that 'flow according to common understanding as the natural and probable consequences of the breach,' that is, those arising naturally 'according to the usual course of things, and from such breach of the contract itself,' . . . 5. We think that the provision against liability for 'consequential' damages, naturally interpreted, provides against liability for damages that do not arise 'according to the usual course of things, from such breach of contract itself' that is, against liability for 'special' damages that are the consequences of special circumstances known to the parties at the time the contract was made.*
> (Emphasis added) (74 N.E.2d at 302)

In the case at bar, the Appellee, Westinghouse, even assuming the unconscionable exculpatory warranty provisions prepared by them apply, has not shown that the Appellant, Southwest, would

not be able to recover any damages whatsoever, and as such, the granting of a summary judgment was improper.

In the case of *United States v. Chicago B&Qr. Co.,* 82 F.2d 131 (8th Cir. 1966) the Court stated, with regard to consequential damages:

> Ordinarily, 'consequential damages' are those which do not arise from any immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while 'proximate damages' are those which accrue directly and in natural sequence, and as a specific (hurtful) result of the act done, without the intervention of an independent cause. (82 F.2d at 136)

In the case of *J. C. Penney Company v. Westinghouse Electric Corporation,* 351 F.2d 561 (7th Cir. 1965), the Court held that damages resulting directly from the injuries sustained are not consequential in nature.

Another case which allowed recovery of incidental damages is the case of *Lanners v. Whitney,* 428 P.2d 398 (Ore. 1967) which involved a suit to cancel a contract for the purchase of a used airplane and in regard to damages recoverable by the agreed purchaser the Court, relying upon §2-715 of the *UCC,* held that the plaintiff was entitled to the cancellation of the contract and recovery of so much of the purchase price as had been paid, including the value of the airplane given to the defendant as part of the purchase price, and in addition thereto:

> . . . plaintiff may recover for incidental damages as provides in ORS 72.7110 and 72.7150 for expenses reasonably incurred as a result of seller's breach, including those incurred in the care and custody of the goods. Comment 2 to ORS 72.7110 tells us that such expenses are measured by their cost. We find that plaintiff is entitled to recover the amounts spent in repair on the aircraft on the Chicago trip, amounts spent to preserve the craft after the Chicago trip, including cost of removal of the radio and battery, installation of storage oil, ground insurance and storage charges. (428 P.2d at 404)

Also, the fact that Southwest may have computed their damages through the use of an improper measure of damages does not render

their claim invalid. In the case of *United States v. Light,* 3 F.R.D. 3 (M.D.Pa. 1943) the plaintiff filed a motion for summary judgment which was predicated upon the proposition that defendant's claim for damages, by way of credit, was one for liquidated damages, and since the contract between plaintiff and defendant did not contain any agreement for liquidated damages, the defense was without merit. The Court, while dismissing plaintiff's contention and denying its motion for summary judgment, stated the following, at p. 5:

> This contention fails because there is no rule requiring the claimant to specify items of general damage, and a claim is sufficient if it sets forth a claim for a lump sum. Furthermore, even though the amount claimed was computed through the use of an improper measure of damages, or included items not properly recoverable, the claim is not rendered invalid thereby.

Therefore, it is respectfully submitted that under the controlling Pennsylvania law as found in the case of *Willred Company v. Westmoreland Mfg. Co., supra,* and its interpretation of §2-715 of the *UCC,* and the cases defining incidental and consequential damages, that in the case at bar, Westinghouse, assuming arguendo that their unconscionable exculpation of consequential damages applies, would be liable to Southwest for any incidental damages sustained by Southwest and some if not all of the damages sustained by Southwest are incidental damages.

Also, the case of *Armco Steel Corporation v. Ford Construction Co., supra,* sets forth the requirement that Westinghouse must show that *all damages* which resulted from the defective products supplied by Westinghouse to Southwest were "consequential damages." This they have not done because in the Court's own words, Southwest is seeking *"the cost of repairs made by Rusk Engineering Company to the turbine generator unit, an additional caustic* (used in the paper making process) *purchased to offset that loss from the recovery boiler as a result of the shut-down of the turbine,* together with recovery of fixed operating costs *and the cost of repairs relating to the exciter unit."* These are items of incidental damages.
(Emphasis added)

In conclusion, it is respectfully submitted that, assuming arguendo that the Westinghouse unconscionable exculpatory clause applies, the granting of a summary judgment in this case by the lower Court was improper because Westinghouse has not shown as a matter of law that all of the damages sustained by Southwest are non-compensable, and as such, Westinghouse has failed in its heavy burden to show that it is entitled to a judgment as a matter of law.

QUESTION VI AFFECTING SPECIFICATION OF ERROR 3, 7, 8, 9, 10, 12, 13, 18, 21, 22, 26, and 27.

ARGUMENT

VI. Did the Lower Court Improperly Grant Westinghouse' Motion for Summary Judgment Based Upon the Theory of Strict Liability in Tort When All Indications Would Show That the Supreme Court of the State of Arizona Would Grant Recovery to Southwest in Strict Liability in Tort in the Case at Bar?

A. ARIZONA HAS ADOPTED THE DOCTRINE OF STRICT LIABILITY IN TORT.

Starting in 1964, a series of five Arizona decisions must be analyzed in determining Arizona's position with regard to the infant tort of strict liability.

Colvin v. Superior Equipment Company, 96 Ariz. 113, 392 P.2d 778 (1964) was an appeal by the defendant who was sued by the conditional seller to recover a deficiency arising from the repossession of a power shovel. The defendant counterclaimed, alleging that the shovel had a defectively welded replacement part, which gave rise to an accident, thus delaying performance by the defendant of a construction contract. The court cited *Greenman v. Yuba Power Products, Inc.,* 59 Cal.2d 57, 27 Cal.Reptr. 697, 377 P.2d 897 (1962) in support of its finding that an implied warranty is equally as applicable when made by a dealer to his customer as when made by a manufacturer to the customer.

Next followed the case of *Nalbandian v. Byron Jackson Pumps, Inc.,* 97 Ariz. 280, 399 P.2d 681 (1965) which involved the break-

down of an electric submersible pump sold by defendant to plaintiff's predecessor in interest. The trial court gave judgment for defendant and plaintiff appealed. The Supreme Court reversed and directed that judgment be entered for the plaintiff, holding that plaintiff was entitled to relief under either theory, express or implied warranty.

The importance of the *Colvin* and *Nalbandian* cases, *supra,* lies in the fact they both were product-failure cases, not personal injury cases, and particularly, when read in light of Justice Lockwood's concurring opinion in *Nalbandian, supra.* She reminds the Court that it cited *Greenman, supra,* as authority in *Colvin,* realizing that *Greenman* is a strict liability and tort case. She reiterated the statement in *Colvin* that the same rationale is to be applied whether "we are concerned with an injured man 'as the foundation of accident liability, or by the purchaser to avoid a contract.' " (399 P.2d a5 687)

Then, in 1967, in the case of *O. S. Stapley Company v. Miller,* 6 Ariz. App. 122, 430 P.2d 701, the Arizona Court of Appeals expressly adopted strict liability where the plaintiff was thrown from the front deck of a boat when it suddenly swerved due to an allegedly defective steering mechanism. Citing *Nalbandian, Colvin, Phillips v. Anchor Hocking Glass Corp.,* 100 Ariz. 251, 413 P.2d 732 (1966), *Crystal Cola-Cola Bottling Co. v. Cathey,* 83 Ariz. 163, 317 P.2d 1094 (1957), and the California case of *Greenman v. Yuba Power Products Inc., supra.*

The Arizona Court of Appeals again applied strict liability in *Bailey v. Montgomery Ward and Company,* 6 Ariz. App. 213, 431 P.2d 108 (1967), where an infant plaintiff was denied recovery by the trial court for injuries resulting when a pogo stick purchased from the defendant disintegrated. Reversing the trial court, the Court of Appeals remanded the decision for application of the doctrine of strict liability in tort as enunciated previously in *Stapley, supra.*

The Arizona Supreme Court has yet to face foresquare the question of strict liability, but the case of *Shannon v. Butler Homes, Inc.,*

102 Ariz. 312, 428 P.2d 990 (1967) indicates its approval of the doctrine:

> The allegation of implied warranty adds nothing to appellant's case. The liability of a manufacturer of an article is in tort (see Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732, *and concurring opinion of Justice Lockwood in Nalbandian v. Byron Jackson Pumps,* 97 Ariz. 280, 399 P.2d 681), and it is not assumed by agreement but imposed by law. (428 P.2d at 993) (Emphasis supplied)

Noteworthy is the fact that the Supreme Court, in citing authority for the proposition that the liability of a manufacturer of an article is in tort, cited the concurring opinion of Justice Lookwood in *Nalbandian, supra.*

There can, therefore, be little reasonable doubt that the Arizona Supreme Court approves the doctrine of strict liability in tort and that it will vigorously apply it when faced with the question. Furthermore, by virtue of Justice Lockwood's interpretation of the doctrine and statement that it applies in the type of cases as presented in *Colvin* and *Nalbandian, supra,* is strong persuasion that the Arizona court refuses to limit the doctrine to personal injury cases only.

The New Jersey court, in *Santor v. A. and M. Karagheurian,* 44 N.J. 52, 207 A.2d 305 (1965) has sustained the position advanced by Appellant in the case at bar. Santor sued the manufacturer of a defective carpet for which he recovered on the theory of Strict Liability in Tort.

Arizona has apparently aligned itself with the thinking of the *Santor* case, *supra.* The nature of the loss and the recovery granted parallel that which is sought herein. That Court ignores the arbitrary distinctions imposed in *Seely v. White Motor Company,* 45 Cal.Rptr. 17, 403 P.2d 145 (1965), and is in line with the reasoning of Justice Peters' dissent. This case, it is submitted, when read in conjunction with the Arizona cases, reflects the position the Arizona court would assume if the case at bar was before it.

B. IN APPLYING THE DOCTRINE OF STRICT LIABILITY IN TORT, THERE IS NO VALID REASON FOR DENYING RECOVERY FOR LOSS INCURRED BY SOUTHWEST.

The lower Court in its Opinion states:

> All damages sought by Southwest in this case are consequential damages. (TR 981)

That fact apparently is the basis for the lower Court's decision in denying the applicability of strict liability in tort. In fact, the Court cites *Rossignol v. Danbury School of Aeronautics, Inc.*, 154 Conn. 549, 227 A.2d 418 (1967) in which the Connecticut court, applying the elements set forth in Restatement Second, *Torts* §402A, requires as a basis for recovery that the defective product cause ". . . physical harm to the consumer or user or to his property . . ." (227 A.2d at 424).

The lower Court then states in the Footnote to its Opinion:

> None of these elements is presented here. (TR 998)

There was in fact physical damage done to the property of the plaintiff: scoring in the cylinder wall of the mechanism as well as on the piston (Appeal Transcript, pp 134-135); burning of one bar of the armature of the exciter (Appeal Transcript, p. 139); two additional bars were badly burned (Appeal Transcript, p. 144).

Appellants in the case at bar are persuaded by the reasoning of Justice Peters' in his dissent in *Seely v. White Motor Company, supra,* as follows:

> In Greenman we allowed recovery for 'personal injury' damages. It is well established that such an award may include compensation for past loss of time and earnings due to the injury . . . for loss of future earning capacity . . . and for increased living expenses caused by the injury. . . . There is no logical distinction between these losses and the losses suffered by plaintiff here. All involve economic loss, and all proximately arise out of the purchase of a defective product. *I find it hard to understand how one might, for example, award a traveling salesman lost earnings if a defect in his car causes his leg to break in an accident but deny that salesman his lost*

earnings if the defect instead disables only his car before any accident occurs. The losses are exactly the same; the chains of causation are slightly different, but both are 'proximate.' Yet the majority would allow recovery under strict liability in the first situation but not in the second. This, I submit, is arbitrary.

This 'history' of products liability law does not compel a dichotomy between 'economic loss' and other types of damage. Although the various products liability doctrines developed in the field of personal injury claims, the overwhelming majority of courts *today* make no distinction between personal injury damages and property damages (including 'economic loss') in products liability cases. If no such distinction was made under the products liability doctrines in use *before* Greenman, then such a distinction *under* Greenman's strict-liability doctrine may be reasonably (though not necessarily) made only on the basis that protection of life and limb is of greater social value than protection against financial loss. But, as money damages do not replace the life or limb lost, this basis is sound only to the extent that allowing recovery for personal injuries on a strict liability theory operates as a *deterrent* (vis-a-vis the theories formerly used) which induces manufacturers to be *more* careful in their production methods. But it is highly doubtful that Greenman's imposition of strict liability does furnish such a deterrent, in view of the fact that, at the time Greenman was rendered, the doctrine of *res ipsa loquitur* and the weakening of the 'privity' requirement in implied warranty actions would have often subjected the manufacturer to liability, or at least to litigation, in any event, whenever a defect in his product caused an injury. (403 P.2d at 153-154) (Emphasis added and supplied)
(Citations omitted)

As further rebuttal of the majority reasoning to the effect that the risk of personal injury and damages should be borne by the manufacturer because "the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured" Justice Peters argues:

Conversely, an economic loss might be an 'overwhelming misfortune' in a given case, but I doubt that any court would

> allow recovery in such a case and deny it in other economic loss cases. 'Overwhelming misfortunes' *might* occur more often in personal injury cases then in property damage or economic loss cases (although the majority cite no evidence to this effect), but this is no reason to draw the line between these types of injury when a more sensible line is available. *Suppose, for example, defective house paint is sold to two home owners. One suffers temporary illness from noxious fumes, while the other's house is destroyed by rot because the paint proved ineffective (a loss generally uninsured). Although the latter buyer may clearly suffer the greater misfortune, the majority would not let him recover under the strict liability doctrine because his loss is solely 'economic,' while letting the first buyer recover the minimal costs and lost earnings caused by his illness.*
> (403 P.2d at 155-156)
> (Emphasis added and supplied)

If the law of torts is to be applicable to the corporate plaintiff as well as the individual plaintiff, then it should be recognized that a corporation cannot be "personally injured." Furthermore, it cannot incur pain and suffering, grief and other various elements uniquely damaging to the person. Basically, the corporation's only potential injury lies in its pocketbook.

In conclusion, it is therefore respectfully submitted that the trial Court improperly granted Westinghouse' motion for summary judgment as to Count Two of Southwest's complaint, because at the present time all indications affirmatively show that the Supreme Court of the State of Arizona would grant recovery to Southwest based upon a theory of strict liability in tort.

QUESTION VII AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, and 26.

ARGUMENT

VII. When a Seller Has Not Disclaimed Express and Implied Warranties, Can the Seller Effectively Disclaim Express and Implied Warranties Given by Merely Restricting the Damages and Remedies of the Buyer Without Complying With the Precise Requirements for Disclaimer of Express and Implied Warranties as Provided for in the Uniform Commercial Code?

A. ASSUMING ARGUENDO, THAT THE UNCONSCIONABLE EXCULPATORY CLAUSE OF WESTINGHOUSE APPLIES, THEN WESTINGHOUSE HAS NOT DISCLAIMED THE EXPRESS AND IMPLIED WARRANTIES GIVEN TO SOUTHWEST AND WESTINGHOUSE SHOULD NOT BE ALLOWED TO DO SO BY USING AN INCONSPICUOUS UNCONSCIONABLE EXCULPATORY CLAUSE LIMITING THE REMEDY OF SOUTHWEST.

In the case at bar, Westinghouse has warranted the high reliability of their product in one breath, and in the next breath, and in fact on the back of the same page where they warrant the high reliability of their product, they atempt to disclaim all liability in the event their product did not have the high reliability previously stated. In the Appellee's Exhibit (Letter from Mr. J. J. Sherman on behalf of Westinghouse to Rust Engineering Company regarding Rust's inquiry), it is stated:

> *In view of the fact that the proposed unit will be the only source of electrical power for the craft and newspaper mill, we direct your attention to several Westinghouse features that contribute to the high realiability of our unit. We urge these features be considered in your evaluation.* (Emphasis Added)

Mr. Sherman, on behalf of Westinghouse, goes on to state in this same letter:

> In addition to these engineering features, we also wish to point out that we have facilities to properly handle this plant site. We have sales, consulting and application, and service engineers located in Phoenix, Arizona. We also have a completely equipped repair shop in Phoenix.

It should also be noted by the Court that Westinghouse, as Armco, in *Armco Steel Corp. v. Ford Construction Co., supra,* in the same

breath in which it informed Southwest of the high reliability of their unit and that it would be the only source of electrical power for their craft and newspaper mill, on the back of page 1 of that letter, in small and unintelligible type, attempts to disclaim all liability with regard to "... the high reliability of our unit" provided to Southwest by stating:

> Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part or parts, and such corrections shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

Southwest would submit that the unconscionable exculpatory clause of Westinghouse is nothing more than an artful way to disclaim express and implied warranties. Can it be said, as a matter of law, that whatever Westinghouse giveth they can taketh away by their unconscionable exculpatory clause?

Article 2, §2-316 of the *Uniform Commercial Code* provides the appropriate method and procedure by which a person can exclude or modify the implied warranty of merchantability and the implied warranty of fitness. The appropriate provisions are found in subsections 2 and 3, which state:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'
>
> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all

> faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

The official comments to §2-316 state that there is no prior uniform statutory provision and Comments 3 and 4 state the strict requirements that must be complied with if the seller is to exclude the implied warranties of merchantability and fitness by stating:

> 3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.
>
> 4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

In the case of *Boeing Aircraft Company v. O'Malley,* 329 F.2d 585 (8th Cir. 1964), Boeing appealed from a judgment entered against it based upon a breach of the implied warranty of fitness. Boeing contracted to sell a helicopter, and the contract of sale provided the following disclaimer:

> (b) The foregoing warranty is given and accepted in lieu of any and all warranties, expressed or implied, rising out of the sale of the helicopter. (329 F.2d at 588)

The United States Court of Appeals for the 8th Circuit, applying Pennsylvania law, held as a matter of law, that the attempted disclaimer of implied warranties by Boeing was ineffective because

implied warranties must be disclaimed by the most precise terms and the disclaimer must be so clear, definite and specific as to leave no doubt as to the intent of the contracting parties.

Although the *Boeing* case, *supra,* was decided under the *1954 Pennsylvania Uniform Commercial Code,* the requirements for disclaiming like warranties under Pennsylvania's present *Uniform Commercial Code* has not materially changed in its effect.

A Pennsylvania case involving the replacement of defective parts, decided under the *Uniform Sales Act,* is the case of *Jarnot v. Ford Motor Company,* 191 Pa.Super. 422, 156 A.2d 568 (1959). In the *Jarnot* case, the plaintiff, a truck owner, brought an action against the distributor and manufacturer for damages allegedly caused by a defect in a new truck. The plaintiff received judgment, and the manufacturer appealed, such appeal being affirmed.

The facts show that the plaintiff purchased a Ford tractor and cab for $4,973 and that within 90 days the tractor was destroyed when an essential part of the steering mechanism, a king pin, had broken. The trailer could not be repaired and it cost $1,700 to repair the tractor. Plaintiff was awarded $4,800 for the value of the trailer when destroyed, plus the cost of repairing the tractor. The contract of sale contained the following attempted disclaimer by Ford, which stated:

> The Ford Motor Company warrants all such parts of new automobiles, trucks and chassis, except for tires, for a period of ninety (90) days from the date of original delivery to the purchaser for each new vehicle or before such vehicle has been driven 4,000 miles, whichever event shall first occur, as shall, under normal use and service, appear to it to have been defective in workmanship or material. This warranty shall be limited to shipment to the purchaser without charge except for transportation, of the part or parts intended to replace those acknowledged by the Ford Motor Company to be defective. The Ford Motor Company cannot however, and does not accept any responsibility in connection with any of its automobiles, trucks, or chassis when they have been altered outside of its own factory or branch plant. (156 A.2d at 571)

The Court noted that the warranty applied exclusively to the replacement of a defective part; however, the Court held that this had no bearing on the question of liability of Ford Motor Company where the failure of a defective part resulted in damage covered by another and distinct implied warranty of merchantability and fitness for the intended use of the vehicle.

The Pennsylvania Courts have also consistently held that an implied sales warranty arises independently and outside of the contract of sale and is imposed by operation of law, and that a provision in a written contract of sale, stating that it contains all agreements between the parties, does not preclude an implied warranty. See *Frigidinners v. Brachton Gun Club,* 176 Pa.Super. 643, 109 A.2d 202 (1954; *Jarnot v. Ford Motor Company, supra.*

The requirements of subsection (2) of §2-316 also require that any attempt to exclude or modify an implied warranty must be conspicuous and, the Courts have held in interpreting the *Uniform Commercial Code,* that when a disclaimer of implied warranty is not conspicuous, then an issue of fact is raised to determine whether or not the attempted disclaimer was effective.

In the case of *Minkes v. Admiral Corporation,* 48 Misc.2d 1012, 266 N.Y. Sup.2d 461 (1966) the purchaser brought an action against the defendant for alleged breach of contract relating to implied warranties. The plaintiff alleged that the refrigerator purchased did not comply with the implied warranties of merchantability and fitness as set forth in the *U.C.C.* The defendant contended that §2-316 permitted a disclaimer of implied warranties and exhibited the "Purchase Order" to show that such had been disclaimed. In the *Minkes* case, as in the case at bar, the prelude to the disclaimer was in large type and the disclaimer was in 5-point and smaller type than the rest of the purchase order. The Court held that the burden of preparing an effective disclaimer was heavy, and that it was one of the hazards of business, stating that before a merchant could disclaim an implied warranty, it must be shown that the customer was clearly placed on notice. The Court, in dismissing

defendant's motion for summary judgment held that since the disclaimer was in smaller type than the rest of the purchase order, it was not conspicuous, and as such, an issue of fact remained to be determined at the trial of the matter.

Southwest's concern about Westinghouse' artful disclaimer of warranties by its unconscionable exculpatory clause is fortified by the authors of 3 Bender's *Uniform Commercial Code Service* §7.03(2), p. 4-46, wherein they state, in Footnote 30:

> On the other hand (and there always seems to be another hand), Comment 3 to Section 2-719 states: 'The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.' Comment 2 to §2-316 states:
>
> > 'This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.'
>
> So speak the Comments for whatever help they may be. It is still difficult to perceive how a limitation clause can be unconscionable and a disclaimer clause conscionable in the same situation. The Comments seem to say that a seller may not exclude consequential damages but he may, effectively, exclude all liability by a disclaimer provision, including liability for consequential damages. *If this is the reading to be given Sections 2-316, 2-719, and 2-302, it is submitted that the Code does not make much sense.*

Therefore, it is respectfully submitted that, in the case at bar, Westinghouse, assuming arguendo that its unconscionability clause applies, has not effectively disclaimed liability for breach of the applied warranty of merchantability and the implied warranty of fitness. If the *UCC* is to say that a seller must do certain things in a precise manner to disclaim the implied warranties of fitness and merchantability, then it is respectfully submitted that the same type of disclosure and precision should be required when a seller,

although granting express and implied warranties, seeks to restrict any obligation or liability from a breach thereof by an exculpatory disclaimer, as in the case at bar. Are not the remedies granted to a buyer just as important to the buyer as the implied warranties of fitness and merchantability? The answer to this question must be in the affirmative, for if it were not, then why should any seller at any time attempt to disclaim or limit the implied warranties when he can effectively do so merely by exculpating himself from damages or by merely restricing the buyer's remedies.

CONCLUSION

For the reasons and under the authorities set forth at length hereinbefore, it is respectfull submitted that the lower Court improperly granted the Appellee's Motion for Summary Judgment under the circumstances of this case.

Respectfully submitted,

O'Connor, Cavanagh, Anderson,
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Attorneys for Appellant

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard E. Mitchell

(Appendices Follow)

APPENDIX NO. ONE

Exhibit Number	Description	— Appeal Transcript Page Number — Identified	Offered	Received
A	Plaintiff's Exhibit No. 1			
B	Defendant's Exhibit No. Y-2	195	197	198
C	Defendant's Exhibit No. EEE	181	181	182
D	Defendant's Exhibit No. Y-1	194	197	197
E	Defendant's Exhibit No. KKK	179	180	180
F	Defendant's Exhibit No. Y-3	200	203	203
G	Plaintiff's Exhibit No. 2-A			
H	Defendant's Exhibit No. XXX	186	217	217

APPENDIX NO. TWO

Exhibit Number	Description	Record Page Number
A	Reply to Counterclaim	18-19
B	Amended Complaint	777-785
C	Answer to Amended Complaint	746-750
D	Amendment of Complaint—July 29, 1967	880-882
E	Amended Answer and Counterclaim to Plaintiff's Amended Complaint Filed August 7, 1967	887-892
F	Opinion	978-1007
G	Order and Judgment (Partial Summary Judgment)	1008-1011
H	Argument of Counsel	(Appeal Transcript: pp. 236-274)

Appendix I

[CONFORMED COPY]

ENGINEERING AND CONSTRUCTION CONTRACT

THIS CONTRACT made and entered into as of May 17, 1960, by and between SOUTHWEST FOREST INDUSTRIES, INC., a corporation organized under the laws of the State of Nevada and having its principal office in Phoenix, Arizona (hereinafter called "SOUTHWEST"), and THE RUST ENGINEERING COMPANY, a corporation organized under the laws of the State of Delaware and having its principal office in Pittsburgh, Pennsylvania (hereinafter called "Contractor"), in consideration of the mutual covenants and conditions hereinafter contained,

WITNESSETH:

WHEREAS, SOUTHWEST proposes to build on its site approximately 15 miles west of Snowflake, Arizona, a Pulp and Paper Mill and related facilities with an average annual production capacity (based on 358 operating days) of 65,000 tons of kraft products, in the proportion of 53,000 tons of linerboard and 12,000 tons of 40# multiwall bag paper, and 75,000 tons of standard white newsprint paper, each of merchantable quality (said Pulp and Paper Mill and related facilities as described under "Scope of Work" hereinafter called the "Project"); and

WHEREAS, SOUTHWEST desires to employ, and to enter into a contract with Contractor to design, to furnish the materials, machinery and equipment for, and to install, erect and construct, the Project, on a Cost-Plus-a Fixed-Fee, guaranteed-maximum Price (including provisions for participation in savings) basis in accordance with the terms and conditions hereof.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties hereto mutually agree as follows:

ARTICLE I — SCOPE OF WORK

A. GENERAL DESCRIPTION OF PROJECT

The Project is generally described as follows:

> A kraft and newsprint mill to be constructed on a site approximately 15 miles west of Snowflake, Arizona, which mill, together with all appurtenant and related facilities, shall be designed to have an average annual production capacity (based on 358 operating days) of, and which will be capable of sustained production of, 65,000 tons of kraft products, in the proportion of 53,000 tons of linerboard and 12,000 tons of 40# multiwall bag paper, and 75,000 tons of standard white newsprint, each of merchantable quality, utilizing one kraft pulp plant and fourdrinier paper machine for production of kraft products and one groundwood plant and fourdrinier paper machine for production of the newsprint, respectively.
>
> The mill will include adequate storage and preparation facilities for roundwood and chips, chemicals and other raw materials; buildings and equipment for paper, board and newsprint manufacture; a water well field located approximately 11 miles from the mill site; an underground water line extending from the well field to the mill site; an effluent disposal ditch and disposal area; and other components and appurtenances as required for the complete mill.

The Project and the buildings, facilities, machinery and equipment comprising the same and to be constructed, installed and furnished are described and defined in greater detail in the following documents, which documents have been submitted to SOUTHWEST and have been marked for identification by both parties and are attached hereto and fully incorporated herein:

1. Appendix "A" to Proposal No. E-18257 containing Outline Specifications, Equipment List and Data and Drawings, dated November 18, 1959, Revised May 17, 1960.

2. Appendix "B" to Proposal No. E-18257 containing Flow Diagrams and Layout Drawings, dated November 18, 1959, Revised May 17, 1960.
3. Appendix "C" to Proposal No. E-18257 containing General Description of New Kraft Board and Newsprint Mill dated November 18, 1959, Revised April 5, 1960.
4. Appendix "D" to Proposal No. E-18257 containing Design and Construction Standards.

It is understood, however, that the specifications, equipment list, data, diagrams, drawings, descriptions and construction standards contained in and specified by such Appendices shall not be a limitation upon the requirements of Article VIII hereof.

B. ENGINEERING

Contractor shall design the Project and shall furnish all engineering services required in connection with, and shall perform, each of the following:

1. Preparing detailed engineering plans and working drawings for all phases of the Project as may be necessary for construction, completion, and efficient operation of the Project; reviewing and approving manufacturers' drawings; and doing any and all other engineering required in connection therewith.
2. Preparing detailed engineering specifications for equipment and materials, including standards of workmanship and other instructions as may be necessary, and preparing bills of material.
3. Analyzing technical aspects of proposals of manufacturers and vendors for furnishing various items of materials and equipment, and making technical selections as to purchase (after consultation with SOUTHWEST in respect of major items).
4. Selecting the type and character of materials and equipment required.
5. Preparing a detailed estimate of the cost of the Project.
6. Assisting, upon SOUTHWEST's request, in obtaining approvals and licenses as may be required by governmental agencies.

Contractor will furnish SOUTHWEST during the progress of the work with necessary copies of all completed Contractor and vendor drawings and, upon completion of the Project, will deliver to SOUTHWEST the originals of all drawings.

C. PURCHASING, INSPECTION AND EXPEDITING

Contractor will furnish all necessary services required for the purchase of all materials and equipment and for the inspection and expediting of such materials and equipment, such services to include generally the following:

1. Preparing inquiries, soliciting quotations from lists of vendors and analyzing commercial terms of vendors' proposals.
2. Preparing and issuing the purchase orders and necessary supplements thereto (after consultation with SOUTHWEST in respect of major items), provided no item of foreign manufacture will be purchased without prior approval of SOUTHWEST.
3. Providing engineering inspection of materials and equipment, and witnessing manufacturers' tests before shipment, to the extent deemed necessary.
4. Expediting manufacturers' engineering and the transmittal of manufacturers' shop drawings to accommodate design requirements.
5. Expediting shop production of materials and equipment.
6. Issuing periodic reports to SOUTHWEST on the production status of materials and equipment.

7. Routing and classifying shipments to obtain minimum freight rates and most direct routes.
8. Tracing and expediting shipments to destination.
9. Filing freight claims with carriers for overcharges, losses or damages, if any, and preparing applications to the carriers or to regulatory authorities, if necessary, for rate adjustments.
10. Auditing invoices and otherwise endeavoring to secure fulfillment of purchase order contracts in accordance with the conditions thereof.

Contractor shall schedule and handle all purchases so as to take advantage of all available cash and trade discounts, rebates and refunds and all such discounts, rebates and refunds and all proceeds from the sale of surplus materials shall be credited to the "Cost of the Work" (as hereinafter defined).

Contractor covenants and agrees to conduct its purchasing program and work in connection with the Project so as to obtain benefit from manufacturer's warranties with respect to, and guarantees of the performance of, machinery, equipment and other apparatus and facilities to be a part of the Project and to pass to SOUTHWEST, as soon as possible, all such manufacturer's warranties and guarantees.

D. CONSTRUCTION

Contractor shall plan, organize, supervise and direct construction of the Project and shall furnish all labor, material, process equipment, tools, construction equipment and supervision necessary to construct and complete, and shall construct and fully complete, the Project in a workmanlike manner in accordance with this Contract and Contractor's prints, working drawings, equipment lists and specifications and good engineering practices and accepted construction procedures.

The construction work to be performed hereunder shall be carried out in accordance with the schedule for starting and completing the principal sections of the construction work and Contractor shall coordinate its engineering and purchasing functions with such Construction Schedule. A tentative construction schedule, indicating the number of months required after start of work to complete each part of the Project, accompanies this Contract; a detailed approved Construction Schedule will be mutually agreed upon and become a part of this Contract when vendors' certified arrangement and fabrication drawings have been approved and firm delivery dates of equipment have been established.

E. WATER WELLS AND SUPPLY

Contractor shall drill and equip four (4) wells designed to produce 8,000,000 gallons of water in a twenty-four hour period, said wells to be drilled and developed in reliance upon and in accordance with recommendations contained in W. F. Guyton and Associates' report on ground water conditions, dated December 29, 1956, and subsequent letter, dated October 7, 1959, copies of both of which have been delivered to Contractor, and "Specifications for Snowflake Wells", prepared by W. F. Guyton and Associates under date of March 14, 1960, Revised April 1, 1960, contained in Appendix "A" to Proposal No. E-18257 referred to in subparagraph 1 of paragraph A of Article I hereof.

Contractor shall also design or designate the placement of, and install, all facilities and apparatus (including the main water pipeline, water service lines, pumps and valves and fittings) requisite to the transportation of such water to the mill site and its proper utilization and distribution therein and thereupon so as to insure proper and efficient use thereof in the Project's manufacturing operations.

In the event further investigation shall result in a decision by SOUTHWEST to move the well field westward, with a view toward reducing the estimated cost of the mill water supply line, any saving developed by so moving the well field will be credited to the guaranteed-maximum cost (as hereinafter defined and discussed) of the Project.

F. Items to Be Furnished by Southwest

Southwest shall arrange for and provide, as and when required by the Construction Schedule, the following:

1. A site upon which to construct the Project and its facilities, as described in Paragraph A of this Article I, including space adjacent to the Project site as required by Contractor for locating construction plant facilities including temporary storage and handling areas and areas for field fabrication and pre-assembly work.
2. Site for the water well field as above described.
3. Right(s)-of-way for the underground water line from the water well field to the mill site.
4. All access roads outside of, and leading up to the fence line of, the mill area.
5. Right(s)-of-way for power and communications lines.
6. Delivery of firm power at 13.8 kv. in an amount of not less than 1000 kw.
7. Sites for the effluent ditch and effluent disposal area.

The cost of the foregoing facilities has been and shall be excluded from the guaranteed-maximum price established and defined in Article VI hereof.

Southwest shall furnish all necessary plant operating supervision and operators, materials, supplies and utilities required for the start-up and initial operating period.

G. Items Which May be Furnished by Southwest

Southwest may from time to time with approval of Contractor purchase and furnish items of material and equipment entering into construction of the Project. In all such instances the guaranteed-maximum price shall be decreased by the cost to Southwest of the items so furnished including transportation and other expenses incurred in delivering the same to the site of the Project.

H. Excluded Items

Contractor shall not be obligated hereunder to furnish any of the following items for plant operation:

1. Spare parts or standby units for equipment to be furnished, except where specified.
2. Fork trucks and automotive trucks.
3. Maintenance materials.
4. Office furniture and equipment.
5. Mill communications systems.
6. First aid equipment.
7. Portable fire extinguishers and hose carts.
8. Mobile yard equipment (other than one Trackmobile).

ARTICLE II — CHANGES IN THE WORK

Southwest may from time to time change the "Scope of Work" by directing Contractor to perform additional work, or may direct the omission of work previously ordered, and the provisions of this Contract shall apply to all such changes, modifications, additions, and omissions. No changes shall be made unless first authorized by a change order in writing signed by authorized representatives of Southwest and Contractor and each such change order shall specify the increase or decrease in the guaranteed-maximum price and in Contractor's fixed fee resulting therefrom.

ARTICLE III — WORKING HOURS

The guaranteed-maximum price hereunder is based upon working a standard forty (40) hour week, five (5) days per week, Monday through Friday, except holidays. If it becomes necessary, with agreement of SOUTHWEST, to work any other shifts of hours or additional hours (except casual overtime), any wage premiums and other extra costs in connection therewith shall increase the guaranteed-maximum price of the Project.

ARTICLE IV — SUBCONTRACTS, PROCEDURE MANUAL AND RECORDS

A. Contractor shall perform the work required hereunder with its own forces but may sublet parts when it is to the best interest of the Contract, but any such subletting, however, shall not relieve Contractor of its obligations hereunder. The specific services to be performed by Contractor, and the controls and approvals to be exercised by SOUTHWEST, shall be itemized in a job procedure manual to be prepared by Contractor and approved by SOUTHWEST.

B. Contractor shall check all material and labor entering into the work and keep such detailed accounts as may be necessary to proper financial management under this Contract, and the system of records and accounting shall be such as is satisfactory to SOUTHWEST or to an auditor appointed by SOUTHWEST. SOUTHWEST shall be afforded access to the work and to all Contractor's records relating to this Contract.

ARTICLE V — COST OF THE WORK

A. The "Cost of the Work" for which Contractor shall be reimbursed (subject to the limitations contained in Article VI hereof) shall consist of all costs, expenses, and losses not compensated by insurance, incurred by Contractor in the performance of the work hereunder (except those items specified in paragraph B of this Article V) and shall include, but not be limited to, the following items:

1. Salaries, payroll taxes and insurance, general holidays, regular vacation and other reasonable and customary allowances of Contractor's project manager and his assistants, project engineer, engineers, designers, draftsmen, estimators, and any other engineering department employees, while and to the extent engaged in the prosecution of the work at the principal or any branch office of Contractor.

2. All wages paid to workmen and foremen and all social security and payroll taxes, subsistence and travel allowances and travel time, pension fund payments, and other monies required to be paid the workmen or collected for their benefit by virtue of established custom or agreement, or as may be found necessary in order to maintain an adequate labor force.

3. Salaries, regular vacation and other reasonable and customary allowances of Contractor's employees stationed at the field office in whatever capacity employed, and of employees while engaged in the home office, at shops or on the road in expediting the production or transportation of material.

4. All expenses incurred for the transportation of the supervisory force required to the site of the work as the construction begins and from the site at the end of the job.

5. Reasonable transportation, traveling, hotel and living expenses of Contractor's officers or supervisory employees necessarily incurred in the discharge of duties connected with the work while away from home base.

6. Cost of all materials, supplies, and transportation thereof, including all temporary structures and facilities and their maintenance.

7. Cost of construction supplies and all tools not owned by workmen.

8. Rentals of all construction equipment and plant or parts thereof (other than any such as shall be furnished by SOUTHWEST without charge therefor pursuant to the provisions of paragraph C of this Article V) whether rented from Contractor or others, at rates approved by SOUTHWEST; transportation of said construction equipment and plant or parts thereof; cost of loading and unloading; cost of installation; dismantling, and removal thereof; and minor repairs and replacements during its use on the work.

9. The total cost of all subcontracts let by Contractor to others in the performance of the work, including the fees paid to subcontractors working on a cost-plus-a-fee basis, except the fees, if any, paid to subcontractors which are subsidiaries or affiliates of Contractor.

10. Premiums on all bonds (other than the performance bond provided for in paragraph D of Article IX) and insurance policies.

11. Miscellaneous expenses, such as telegrams, telephone service, blueprints, expressage, and other petty cash items.

12. Any tax now or hereafter imposed by a Federal, State, Municipal or other government agency, based on or measured by the sale or use of the material, equipment, or services, covered hereby or by the gross receipts from this transaction or any allocated portion thereof, or by the gross value of the material, equipment services, or payroll covered hereby, or any similar tax.

13. Permit fees, royalties, damages for infringement of patents and cost of defending suits therefor.

It is understood and agreed that the amount charged to the "Cost of Work" hereunder pursuant to the provisions of subparagraphs 1, 2, 3 or 5 above, shall be, in each case, proportional to the total work time of any such personnel expended upon work hereunder during the appropriate period.

B. Contractor shall not be reimbursed for the following:

1. Salaries, overhead, or general expenses of any kind in the home office or in any regularly established branch office of Contractor except as these may be expressly included in paragraph A of this Article V, or as may be specifically authorized by SOUTHWEST.

2. Interest on capital employed.

3. Fixed fees, if any, paid to subcontractors which are subsidiaries or affiliates of Contractor.

C. Contractor shall prepare and submit to SOUTHWEST, as promptly after the date hereof as may be practicable, a list of anticipated requirements of construction equipment and plant or parts thereof and SOUTHWEST may at its election furnish all or any portion thereof. If SOUTHWEST shall elect to furnish any of such construction equipment and plant or parts, then either a reasonable rental shall be paid to SOUTHWEST therefor (without adjustment of the guaranteed-maximum price) or if Southwest shall elect to charge no rental therefor, then the guaranteed-maximum price shall be decreased by a mutually acceptable amount. Any such items so furnished by SOUTHWEST shall be placed at disposal of Contractor at such time or times as shall not result in a delay of, or hindrance to, Contractor's Construction Schedule. All tools, equipment, materials, supplies, structures, facilities, plants and other items purchased and charged to "Cost of the Work", which are not incorporated into or consumed in construction of the Project shall be valued by the Contractor upon completion of the Project and credited to the "Cost of the Work" or SOUTHWEST shall have the right to purchase any such item at the designated value in which event the proceeds of such sale shall be credited to the "Cost of the Work."

ARTICLE VI — PRICE

A. Subject to the further provisions of this Article VI, SOUTHWEST shall reimburse Contractor for the cost of the work as defined in Article V "Cost of the Work" and, in addition, shall pay Contractor a fixed fee of One Million Five Hundred Thousand Dollars ($1,500,000).

B. In no event shall the "Cost of the Work" to SOUTHWEST plus the fixed fee exceed the guaranteed-maximum price of Thirty-Two Million Three Hundred Thirty-Four Thousand Five Hundred Dollars ($32,334,500) hereby established subject to the following adjustments:

1. If the "Scope of Work" is changed pursuant to Article II hereof, the guaranteed-maximum price shall be increased or decreased by the amount of the algebraic sum of the amounts specified in all such change orders.
2. If the actual cost of items specifically provided for, and listed as, machine shop equipment and laboratory furniture and equipment shall be more or less than $244,326, the guaranteed-maximum price shall be increased or decreased, as the case may be, by the difference between the actual cost and $244,326.
3. If SOUTHWEST shall furnish items without charge therefor pursuant to paragraph C of Article V hereof, the guaranteed-maximum price shall be decreased by the agreed amount.
4. If the location of the well field is moved pursuant to the provisions of paragraph D of Article I, the guaranteed-maximum price shall be decreased by the agreed amount.
5. If Contractor is required to pay wage premiums or incur other extra costs for additional or unusual hours of work, pursuant to the provisions of Article III, the guaranteed-maximum price shall be increased by the aggregate amount of such additional cost.
6. If Southwest shall furnish items of materials and equipment pursuant to the provisions of paragraph G of Article I hereof, the guaranteed-maximum price shall be decreased by the amount specified in said paragraph G.

Should the sum of the "Cost of the Work" plus the fixed fee be less than the guaranteed-maximum price, if and as adjusted, SOUTHWEST shall pay 25% of the saving to Contractor as additional compensation.

ARTICLE VII — PAYMENT

SOUTHWEST shall, subject to the other provisions of this Contract, advance to Contractor sufficient funds to enable Contractor to pay all costs incurred hereunder, including fee earned. Such funds shall be deposited in a special account by or for Contractor with Morgan Guaranty Trust Company of New York and shall be handled and disbursed by Contractor in such manner as to keep the management of such funds wholly apart and separate from other funds of Contractor. Advancement of, and accounting for, such funds shall be accomplished as follows:

A. On or before the fifteenth day of each month, Contractor shall submit to SOUTHWEST for approval an estimate in reasonable detail, of the "Cost of the Work" for the succeeding month (the Monthly Estimate);

B. Within fifteen days following receipt of the Monthly Estimate, SOUTHWEST shall deposit funds in the approved amount thereof (increased or decreased by the Monthly Adjustment, if any, as defined in paragraph C of this Article VII) in Contractor's special account above referred to;

C. Contractor shall deliver to SOUTHWEST together with the Monthly Estimate, a statement showing in detail money expended by it or otherwise due on account of the work during the preceding month including cost of payments made on equipment even though the equipment is not delivered, together with copies of payrolls and copies of bills for material delivered and work done during said period, and also for such proportionate amount of Contractor's fee as has been earned. Such statement shall also set out the total amount of funds theretofore advanced by SOUTHWEST to cover or on account of the total expenditures and fee payment shown therein. The excess or deficiency of such funds theretofore advanced by SOUTHWEST shall constitute the amount of the Monthly Adjustment referred to above in paragraph B of this Article VII.

D. It is distinctly understood and agreed that all provisions contained in this Contract for payment of Contractor's fixed fee are subject to the further provision that from and after the date payments on

account of such fixed fee shall have aggregated $750,000, no further payments on account of fixed fee shall be made, nor shall any amounts thereof be included in subsequent Monthly Estimates, until completion and acceptance of the Project pursuant to the provisions of Article VIII hereof. Upon such completion and acceptance, however, the balance of the fixed fee shall forthwith be paid over and delivered to Contractor.

ARTICLE VIII — COMPLETION AND ACCEPTANCE

The Project shall be completed on or before August 1, 1962, and shall be deemed completed and shall be accepted by SOUTHWEST when each of the following conditions shall have been met:

A. The Project has been placed in good operating condition; and

B. SOUTHWEST has received a report from Ebasco Services Incorporated (or such other independent firm of engineers of recognized standing as SOUTHWEST and Contractor shall agree upon) expressing the opinion of said firm that the Project has been constructed in a workmanlike manner in accordance with this Contract and the plans, drawings, and specifications and good engineering practice and accepted construction procedures, is in good operating condition and is capable of sustained production of the several products in the amounts and of the quality specified under Article I "Scope of the Work", and that the water supply system installed is capable of delivering from the well sources to the mill, water in quantities adequate for such production; and

C. Not less than 1000 tons of standard white newsprint of merchantable quality shall have been produced;

provided, however, such acceptance shall not be withheld if the above conditions are not met by reason of improper operation of the Project by SOUTHWEST personnel, shortages or unsuitability of raw materials, or other causes not attributable to work performed or required to be performed hereunder by Contractor.

ARTICLE IX — INSURANCE AND LIABILITY

A. INSURANCE

Contractor shall, during the performance of this Contract, keep in force the following insurance:

1. Workmen's Compensation Insurance, including Employer's Liability Insurance for its employees;
2. Public Liability Insurance covering bodily injuries with limits of $1,000,000 one person and $1,000,000 one accident, and Property Damage with limits of $1,000,000 per accident;
3. Automobile Liability Insurance covering bodily injury with limits of $1,000,000 one person and $1,000,000 one accident and Property Damage with limits of $1,000,000 per accident; and
4. Fire, lightning and extended coverage peril insurance, plus installation floater coverage on the Project subject to a deductible of $10,000 per loss, and physical damage insurance on its construction equipment subject to $5,000 per loss deductible.

B. SOUTHWEST CO-INSURED

The insurance required under paragraph A above shall be carried with companies acceptable to SOUTHWEST and, to the extent possible, SOUTHWEST will be named as a co-insured as its interest may appear. SOUTHWEST shall be furnished with copies of all such policies.

C. WAIVERS

SOUTHWEST agrees to waive, and does hereby waive, its right of recovery against Contractor and any of its affiliated or associated companies performing any part of this work for any losses including loss of use to its existing plant or other property, except property to be incorporated in the Project, resulting from fire, lightning, explosion or other extended coverage perils, vandalism and malicious mischief.

D. PERFORMANCE BOND

Contractor, forthwith following the execution of this Contract, shall furnish a bond in an amount not less than Ten Million Dollars ($10,000,000) covering Contractor's faithful performance of this Contract and the payment of all Contractor's obligations arising hereunder, in such form as SOUTHWEST may prescribe and with such sureties as SOUTHWEST may approve. The cost of such bond shall be paid and borne by SOUTHWEST.

ARTICLE X — LIENS

No part of the retained fee shall be or become due and payable until the Contractor, both for itself and all subcontractors, if any, shall deliver to SOUTHWEST a complete release of all liens arising out of this Contract, or receipts for all payments in full in lieu thereof and, if required by SOUTHWEST, an affidavit that so far as Contractor has knowledge, information or belief, the releases and receipts include all labor and material for which a lien could be filed. If any lien, however, remain unsatisfied after all payments are made, the Contractor shall refund to SOUTHWEST all moneys that it may be compelled to pay in discharging such lien or liens, including costs of court and a reasonable attorney's fee. SOUTHWEST shall notify Contractor of any claim that a lien is unsatisfied and Contractor shall have the right to participate with SOUTHWEST in resisting any such claim.

ARTICLE XI — PERMITS

All building or other permits required for construction of the Project shall be obtained and paid for by SOUTHWEST.

ARTICLE XII — TITLE TO THE WORK

The title to all work completed and in course of construction and to all materials, on account of which any payment has been made, shall be in SOUTHWEST.

ARTICLE XIII — GOVERNMENTAL REGULATIONS

Contractor's obligations under this Contract are subject to all applicable governmental regulations, priorities, restrictions or orders now or hereafter in force and Contractor shall comply with and observe the same.

ARTICLE XIV — INDEPENDENT CONTRACTOR

In the performance of its work hereunder Contractor shall be, and shall be deemed to be, an independent contractor; SOUTHWEST exercising no control over the details of such work or the manner of performing the same and being interested only in the results obtained.

ARTICLE XV — AUTHORIZED REPRESENTATIVES

SOUTHWEST and Contractor shall each deliver to the other a list in writing of those officers or employees who have been designated by each of them, respectively, to act as authorized representatives for the purposes of this Contract. Limitations of authority of any such authorized representatives may be stated in such listing but unless stated, each designated authorized representative may be relied upon by the other party as possessing full power to bind his principal. Authorized representatives may be removed or added but no such changes shall be binding on the other party until received in writing by it.

ARTICLE XVI — TERMINATION

This Contract shall continue in force until completion of the Project; provided, however, that SOUTHWEST shall have the right, after 30 days' notice to Contractor in writing, to terminate this Contract in the event of complete abandonment of the Project by SOUTHWEST prior to its completion, in which event SOUTHWEST shall make settlement for the cost of the Project, and shall pay Contractor the amounts due hereunder and unpaid as of the effective date of such termination, including any fee earned but unpaid. It is understood that Contractor's fee shall be not less than the total of the monthly installments

hereof paid and due hereunder at date of such termination, including that installment due for the nonth during which termination occurs, plus all retentions, if any.

ARTICLE XVII—FORCE MAJEURE

In the event the progress of the work shall be delayed for a period or periods aggregating more than 15 days by reason of force majeure, the completion date of August 1, 1962 specified in Article VIII hereof shall be extended by such period of time that the progress of the work shall be so delayed in excess of 15 days; provided, however, that in no event shall such completion date of August 1, 1962 be extended beyond February 1, 1963 except by reason of Acts of God, fire, explosion, flood, civil disturbances, acts of the public enemy, wars, strikes of suppliers of items of major equipment or government orders or regulations. No such extension shall be made for any delay occurring more than seven days before claim therefor is made in writing by Contractor to SOUTHWEST. As used herein the term "force majeure" shall mean Acts of God, strikes, lockouts, boycotts, combinations of workmen, fire, explosion, flood, civil disturbances, acts of the public enemy, wars or any other contingency or cause which is beyond the control of Contractor whether or not of the kind hereinabove specified. Any event of force majeure shall in so far as possible be remedied with all reasonable dispatch.

ARTICLE XVIII — LIMITATIONS

Notwithstanding anything to the contrary contained herein, it is specifically understood and agreed that prior to the Effective Date under the Bond Purchase Agreements to be entered into between SOUTHWEST and the purchasers of the 6¼% General Mortgage Sinking Fund Bonds which SOUTHWEST proposes to issue, the Contractor shall incur only such costs and expenses and do and perform only such work as shall be specifically authorized in advance by SOUTHWEST in writing and SOUTHWEST shall be liable hereunder only to the extent specified in any such authorization; and in the event said Effective Date shall not occur on or before July 1, 1960, either party hereto may terminate this Contract by notice to the other in writing whereupon each party shall be released and discharged of and from any and all liabilities hereunder except to the extent theretofor incurred in accordance with this Article XVIII.

ARTICLE XIX — NO OTHER AGREEMENTS

There are no agreements or understandings between the parties relating hereto other than those written or specified herein.

IN WITNESS WHEREOF, the parties have respectively caused these presents to be signed by their duly authorized officers, and their corporate seals to be hereunto affixed, as of the day and year first above written.

THE RUST ENGINEERING COMPANY

[SEAL]

By S. M. RUST, JR.
President

ATTEST:

D. C. SHAW III
Secretary

"CONTRACTOR"

SOUTHWEST FOREST INDUSTRIES, INC.

[SEAL]

By J. B. EDENS
President

ATTEST:

HARRY R. JONES
Asst. Secretary

"SOUTHWEST"

Westinghouse

ELECTRIC CORPORATION

PHONE EXPRESS 1-2800
306 FOURTH AVENUE
BOX 1017 PITTSBURGH 30 PA

May 16, 1960

Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 19, Pennsylvania

Attention: Mr. John W. Ruyak

Gentlemen:

Inquiry #8285-Q-P13
Our Negotiation #50203
South West Forest Industries

In compliance with your specification E-8285-Q-P13 dated May 3, 1960, we enclose six copies of our proposal for a 25,000 KW turbine generator unit.

Subject to Price Adjustment @ 12,650 KW

We are pleased to quote a price of $1,137,000.00 for the equipment covered in our proposal. The equipment can be shipped from our factory in 15 months from the time a firm order with complete information is received. If this delivery does not line up with your requirements, we would appreciate the opportunity of negotiating with you in an effort to meet your needs. Deliveries on large items such as this can change rapidly because of the situation on large castings and forgings. Drawings for approval could be submitted in 90 days after receipt of an order.

Price policy and terms of payment are prescribed on page 6-B of our proposal. Please note that our price is firm for the shipment quoted.

In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, we direct your attention to several Westinghouse features that contribute to the high reliability of our unit. We urge that these features be considered in your evaluation.

Please refer to the Turbine Illustration Section of our proposal.

PDL-12.0-3 - Combination Stop and Throttle Valve:

The combination stop and throttle valve is oil operated for protection - the valve cannot be opened without lubricating oil pressure being established. This valve can be used on a cold start-up, this permitting steam to be admitted to all nozzle chambers. This permits uniform heating of the turbine cylinder, thereby minimizing stresses in nozzle partitions on cold start-ups.

PRICES This quotation automatically expires fifteen (15) days from this date and by notice is subject to change within this period

TAXES Prices do not include state or local taxes based on or measured by sales, which tax or taxes will be added to the prices where applicable

PAYMENTS If, in the judgment of Westinghouse, the financial condition of the Purchaser, at any time during the manufacturing period, or at the time apparatus is ready for shipment, does not justify the terms of payment specified, Westinghouse may require full or partial payment in advance

Pro rata payments shall become due as shipments are made. If shipments are delayed by the Purchaser, payments shall become due from date when Westinghouse is prepared to make shipment. If manufacture is delayed by the Purchaser, payment shall be made based on the contract price and percent of completion. Apparatus held for the Purchaser shall be at the risk and expense of the Purchaser

DELIVERY Unless otherwise stated, delivery will be made f.o.b. point of shipment. Shipping dates are approximate and are based on prompt receipt of all necessary information from the Purchaser.

LOSS, DAMAGE, OR DELAY Westinghouse shall not be liable for loss, damage, detention or delay resulting from causes beyond its reasonable control or caused by fire, strike, civil or military authority, restrictions of the United States Government or any department, branch or representative thereof, insurrection or riot, embargoes, car shortages, wrecks or delays in transportation, or inability to obtain necessary labor, materials, or manufacturing facilities due to such causes. Receipt of the apparatus by the Purchaser upon its delivery shall constitute a waiver of all claims for delay.

WARRANTY Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

PATENTS Westinghouse shall defend any suits or proceedings brought against the Purchaser so far as based on a claim that any apparatus sold hereunder, or any part thereof, constitutes an infringement of any patent of the United States, other than a claim covering a process or a product thereof, if notified promptly in writing and given authority, information and assistance (at Westinghouse expense) for the defense of same, and Westinghouse shall pay all damages and costs awarded therein against the Purchaser, provided that this agreement shall not extend to any infringement based upon the manufacture, use or sale of any of said apparatus or any part or parts thereof in combination with apparatus or things not furnished hereunder. In case the apparatus or any part thereof furnished hereunder is in such suit held to constitute infringement and its use is enjoined, Westinghouse shall, at its own expense, either procure for the Purchaser the right to continue using said apparatus or part thereof; or, replace same with non-infringing apparatus; or modify it so it becomes non-infringing or remove said apparatus and refund the purchase price and the transportation and installation costs thereof. The foregoing states the entire liability of Westinghouse with respect to patent infringement by said apparatus or any part thereof.

TITLE The title to the apparatus sold as herein specified shall not pass from Westinghouse and shall remain personal property until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in Westinghouse. The Purchaser shall assume all risk of loss after the apparatus is delivered.

CANCELLATION Any order or contract may be cancelled by the Purchaser only upon payment of reasonable charges based upon expenses already incurred and commitments made by Westinghouse.

CONTAINERS Additional charge will be made for returnable containers and special devices (such as oil barrels, reels, tarpaulins, coupling or clamps, etc.) which are used for transportation purposes only. Refund of deposit will be made if returned in good condition to the location designated by the Corporation:

Reels: Within twelve (12) months from date of original shipment by freight collect.

Oil Barrels and Other Special Devices: Within ninety (90) days from date of original shipment by freight prepaid.

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

PDL-1230-21 - Steam Chest:

We are offering our new inserted steam chest on this unit. The inserted type construction permits casting a configuration to give flexibility between groups of nozzle chambers and between nozzle chamber arch and turbine cylinder flanges. Bearing in mind that the unit will be subjected to frequent and relatively large swings in load, we are offering a steam chest with enough freedom of expansion to prevent excessive stresses due to thermal expansion and contraction during load swings.

PDL-1230-16 - Solid Turbine Rotor:

Our turbine rotor is machined from a solid forging. Please note the absence of shrunk and keyed disc. Both turbine and generator rotors are factory balanced. Both are overspeed tested at the factory 20% over rated speed.

PDL-1230-19 - Diaphragm Mountings:

Groups of diaphragms are mounted in separate rings. Special mountings permit the diaphragm rings to expand independent of the turbine cylinders.

PDL-1250-52 - Fully Hydraulic Control System:

We are offering our fully hydraulic governing system. The system is fundamentally simple and inherently flexible for adaptation to a double automatic extraction control system. The governing speed signal is taken directly from the shaft by variation in pressures from the governor oil impellor. For maximum reliability, every effort has been made to eliminate the application of gears, cams, intricate mechanical assemblies, and complex "mechanical" linkage.

PDL-1210-16 - Sliding Type Front Pedestal:

We offer a heavy duty type front pedestal which permits thermal expansion of the turbine cylinder by sliding on lubricated surfaces. For a unit of this size and operating conditions, we offer this type of pedestal support rather than a pedestal supported by flexible I-beams.

PDL-1210-19 - Bearings:

The unit will be equipped with a double Kingsbury type pivoted-shoe thrust bearing. The operation of the thrust bearing depends upon a thin wedge-shaped load carrying oil film between the collar and the shoes of the thrust bearing. The exact shape of the oil film is a function of such variables as shaft speed, oil viscosity, and thrust loading. If the thrust shoes are permitted to pivot freely, they will adjust to the required oil film shape, thereby making the bearing effective for a wide range of possible variation in conditions.

The features of our hydrogen cooled generator are outlined on PDL-1230-31. We should particularly like to call to your attention PDL-

1250-46, which covers Thermalastic Insulation.

You will find our performance curve (MD-1845) included in the proposal. It is our intent that the flow capabilities of the proposed unit in every way reflects the requirements outlined in the specifications. Supplemental information was received verbally which was incorporated as part of the performance field.

We have sized the primary nozzles to pass the maximum steam flow that the power and recovery boilers are capable of generating.

The exhaust of the turbine is sized to permit carrying 20,000 KW load with zero extraction at both high pressure and low pressure extraction points. This can be done without necessitating building up stage pressures to the point that the low pressure extraction pressure will exceed the rated 60 psig.

The intermediate section of the turbine was sized to pass 275,000 pounds per hour when the high pressure extraction pressure is maintained at 235 psig. This sizing will permit the specified 60 psig. extraction of 150,000 pounds per hour while carrying an electrical load of 25,000 KW.

In addition to these engineering features we also wish to point out that we have the facilities to properly handle this plant site. We have Sales, Consulting and Application, and Service Engineers located in Phoenix, Arizona. We also have a completely equipped repair shop in Phoenix.

Our plant, located in Sunnyvale, California, also has the facilities to manufacture this turbine should any labor trouble persist at our Lester, Pa., Plant.

In accordance with your request we are also attaching to this letter a partial list of installations that we have of units similar to this design and capacity.

We trust we will be given the opportunity to present our story to your people personally, so that we can answer all of your questions, in an effort to make it easier for you to make your evaluation.

Yours very truly,

J. J. Sherman
Sales Engineer

JJS:AWC

PARTIAL LIST OF INSTALLATIONS

Customer	KW Rating	Inlet PSIG	Inlet °F. TT	Extraction HP	Extraction LP	Exhaust PSIG	Exhaust In.HG.	Year Installed	Unit Location
Fraser Paper Co., Ltd.	15,625	1200	950	150	30	-	1.5	1958	Madawaska
Oxford Paper Company	12,500	380	625	60	-	-	1.5	12/55	Rumford
Columbia Southern Chemical	18,750	850	900	70	-	-	2.0	1954	Barberton, Ohio
Youngstown Sheet & Tube	25,000	800	750	200	-	-	2.0	5/58	Indiana Harbor
Bowaters Southern Paper	25,000	850	900	50	-	-	2.0	7/57	Calhoun
Bethlehem Steel Co.	25,000	850	850	260	-	-	2.0	11/51	Franklin Works
Brown & Root (3 Units) Houston, Texas	37,500	1650	1000	700	-	-	2.5	10/58	Ravenna, Italy
Dow Chemical (2 Units)	37,500	1250	825	425	165	25	-	'49 & '52	Midland, Mich.

cc: M.K.Sweinhart
C.D.Hardy
C.E.Rosenberg
C.A.Erwin
R.S.Wilson
H.C.Leatham, Jr.
File

Dellis Hopkins
Dept E-1

Dellis Hopkins
Dept E-1

E-5

Dellis Clarke
Dept E-1

JUNE 6, 1950

WESTINGHOUSE ELECTRIC CORPORATION
306 4TH AVENUE
UNION BANK BUILDING
PITTSBURGH 22, PENNSYLVANIA

ATTENTION: MR. J. J. SIERSON

SUBJECT: GOVERNMENT PROJECT INVESTIGATION, NO. 25,000 KW TURBINE-GENERATOR UNIT
WESTINGHOUSE ELECTRIC CORP. #60813

GENTLEMEN:

IT IS THE INTENTION OF SOUTH [illegible] TO ISSUE A FORMAL ORDER TO COVER THE PURCHASE OF ONE 25,000 KW TURBINE-GENERATOR UNIT, SPECIFICALLY IN ACCORDANCE WITH YOUR ABOVE REFERENCED PROPOSAL.

HOWEVER, IN THE INTERIM, PLEASE ACCEPT THIS LETTER OF INTENT AS YOUR AUTHORIZATION TO PROCEED IMMEDIATELY [illegible] DATE FOR DETERMINATION OF DELIVERY FOR THIS TURBINE-GENERATOR UNIT IS UNDERSTOOD HAS BEEN ESTABLISHED FOR APPROXIMATELY [illegible].

VERY TRULY YOURS,

THE RUST ENGINEERING COMPANY

S. D. CLARKE, JR.
PURCHASING AGENT

SDC/MCM

ORDER ACKNOWLEDGMENT

Westinghouse Electric Corporation

1½" use
2% Sales.

REGIONAL OFFICE: PGH	PRIORITY RATING		
REGIONAL ORDER CORRES.: J RICE	SALESMAN: J J [illegible]	SHIP. REQ.: 41	
TERMS: NET WITHIN 30 DAYS LATER	CODES: 1- T1	DATE: 6/12/60	REFER TO OUR ORDER: GO P3- 83081- T1
F. O. B.: P/S	PRT. ALLD.:	PRT. PPD.: X	CHARGE TRANSP. AT:
		CUSTOMER'S ORDER NO.: 8265- SH 5002	DATE: 6/6/60

RUST ENGINEERING CO (2P)
900 PORT DUQUESNE BLVD
PITTSBURGH 22, PA.
(REFER TO NOTE 2)
ATTN: ACT

SHIP TO
RUST ENGINEERING CO
C/O SOUTHWEST FOREST INDUSTRIES
SNOWFLAKE, ARIZONA

PRICES AUDITED	TAXES AUDITED	TAX CODE AND REG. NO.: LATER	MARK EACH PACKAGE: 8265- SH- 5002
SHIP. B/L TO: NOTE 4	COPY B/L TO: NOTE 4	HOW TO SHIP AND ROUTE: COST WAY	PREPAID: X
REQ. NO.: 60805	PLANNED BY: O JELKINS	DATE	

REQ. NO. AND WT.	ITEM	QUANTITY	DESCRIPTION
			PRICE POLICY:- FINAL PRICES
			DUPLICATE & SECOND COPIES OF ORDER TO:-
			1- PGH OFF- J J RICE O/S
			1- PGH OFF- JC [illegible] COCKRELL
			1- PGH OFF- P J [illegible] SIRANITOCH
			1- NEW YORK OFF- A C HILLARD
			1- EAST PGH- 104- J E [illegible] GOLTZ, IND SALES
			1- PHOENIX OFFICE- D T [illegible] QUICKENDERRY
			2- LOS ANGELES OFFICE- E [illegible] - A J CHURCHILL
			NOTE-1- VERBAL ORDER GIVEN TO G FORTINI SOUTH PHILA PEDDIN TURBINE SALES ON MAY 31, 1960 TO PROCEED WITH OUTLINE DRAWING AND LOADING INFORMATION FOR CUSTOMER WITH SHIPMENT REQUIRED BY JULY 15, 1961 OR BEFORE.
			NOTE-2- INVOICES (5 COPIES) MUST BE RENDERED AND BILLED TO: SOUTHWEST FOREST INDUSTRIES INC. PURCHASING DEPT SNOWFLAKE, ARIZONA

1 SHEET XXX CONTINUED FINAL

YOUR ORDER HAS BEEN ENTERED AS OUR GENERAL ORDER (GO) NUMBER AS SHOWN ABOVE.
Our Regional Order Correspondent will be better able to serve you if our GO Number is referred to in all communicatio
Our shipping promise will be given you as soon as acknowledgment of this order is received from our factory

SEE REVERSE SIDE FOR TERMS AND CONDITIONS

TERMS AND CONDITIONS

The conditions stated below shall take precedence over any conditions which may appear on your standard form, and no provisions or conditions of such cept as expressly stated herein, shall be binding on Westinghouse.

XES: Prices do not include state or local taxes based on or measured , which tax or taxes will be added to the prices where applicable.

YMENTS: If, in the judgment of Westinghouse, the financial con- f the Purchaser, at any time during the manufacturing period, or ime apparatus is ready for shipment, does not justify the terms of specified, Westinghouse may require full or partial payment in

rate payments shall become due as shipments are made. If ship- e delayed by the Purchaser, payments shall become due from date estinghouse is prepared to make shipment. If manufacture is delayed Purchaser, payment shall be made based on the contract price and of completion. Apparatus held for the Purchaser shall be at the expense of the Purchaser.

LIVERY: Unless otherwise stated, delivery will be made f.o.b. point ent. Shipping dates are approximate and are based on prompt re- ell necessary information from the Purchaser.

SS, DAMAGE, OR DELAY: Westinghouse shall not be liable for nage, detention or delay resulting from causes beyond its reasonable or caused by fire, strike, civil or military authority, restrictions of the ited States Government or any department, branch or representative thereof, ion or riot, embargoes, car shortages, wrecks or delays in transpor- or inability to obtain necessary labor, materials, or manufacturing due to such causes. Receipt of the apparatus by the Purchaser delivery shall constitute a waiver of all claims for delay.

ARRANTY: Westinghouse, in connection with apparatus sold here- grees to correct any defect or defects in workmanship or material ay develop under proper or normal use during the period of one m the date of shipment, by repair or by replacement f.o.b. factory defective part or parts, and such correction shall constitute a fulfill- all Westinghouse liabilities in respect to said apparatus, unless other- ted hereunder. Westinghouse shall not be liable for consequential

PATENTS: Westinghouse shall defend any suits or proceedings brought against the Purchaser so far as based on a claim that any apparatus sold hereunder, or any part thereof, constitutes an infringement of any patent of the United States, other than a claim covering a process or a product thereof, if notified promptly in writing and given authority, information and assistance (at Westinghouse expense) for the defense of same, and Westinghouse shall pay all damages and costs awarded therein against the Purchaser, provided that this agreement shall not extend to any infringement based upon the manufacture, use or sale of any of said apparatus or any part or parts thereof in combination with apparatus or things not furnished hereunder. In case the apparatus or any part thereof hereunder is in such suit held to constitute infringement and its use is enjoined, Westinghouse shall, at its own expense, either procure for the Purchaser the right to continue using said apparatus or part thereof, or replace same with non-infringing apparatus, or modify it so it becomes non-infringing, or remove said apparatus and refund the purchase price and the transportation and installation costs thereof. The foregoing states the entire liability of Westinghouse with respect to patent infringement by said apparatus or any part thereof.

TITLE: The title to the apparatus sold as herein specified shall not pass from Westinghouse and shall remain personal property until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in Westinghouse. The Purchaser shall assume all risk of loss after the apparatus is delivered.

CANCELLATION: Any order or contract may be cancelled by the Purchaser only upon payment of reasonable charges based upon expenses already incurred and commitments made by Westinghouse.

CONTAINERS. Additional charge will be made for returnable containers and special devices (such as oil barrels, reels, tarpaulins, commutator clamps, etc.) which are used for transportation purposes only. Refund of deposit will be made if returned in good condition to the location designated by the Corporation.

REELS. Within twelve (12) months from date of original shipment by freight collect.

OIL BARRELS AND OTHER SPECIAL DEVICES. Within ninety (90) days from date of original shipment by freight prepaid.

ORDER ACKNOWLEDGMENT

Westinghouse Electric Corporation

DATE | REFER TO OUR ORDER

GO P3- 88831- T1

PKG. NO. & WT	ITEM	QUANTITY	IDENTIFICATION AND DESCRIPTION
			NOTE-3- ALL NECESSARY INFORMATION MUST BE AVAILABLE BY JULY 7, 1950 FOR CONTRACT MEETING WITH RUST ENGR CO WHICH WILL ENABLE THEM TO PROCEED WITH THEIR ENGINEERING WORKS
			NOTE-4- COPIES OF S/R & B/L AS FOLLOW: 1- PGH OFF- O/S- J J RICE 2- PGH OFF- E J SIMONITSCH 2- LOS ANGELES- E&S A J CHURCHILL 2- CUSTOMER WITH B/L 2- PURCHASER 1- PHOENIX OFFICE- D T QUISENBERRY
			TO BE- ALL ENGINEERING QUESTIONS AND CORRESPONDENCE MUST BE ADDRESSED TO F J SIMONITSCH, PGH OFFICE - E&S DEPT TO EXECUTE WITH COPY TO J J RICE, PGH OFF-, O/S DEPT
			NOTE-5- DRAWING APPROVAL REQUIRED WITH DRAWINGS TO SHOW RETURN ADDRESS AS F J SIMONITSCH, 300 , 8 4TH AVE, P.O. BOX 1017, PGH 30, PA.
			SEND COPIES OF ALL DRAWING FOR APPROVAL TO: 4- MR E J FRITSCHI, EXPEDITING DEPT THE RUST ENGINEERING CO 950 FORT DUQUESNE BLVD PGH 22, PA. 1- NEW YORK OFF- A C HOLLAND - SALES 2- PGH OFF- F J SIMONITCH- E&S T/S PGHOFFICE- JJ RICE O/S
			NOTE-6A AFTER CUSTOMER HAS APPROVED DRAWINGS FINAL COPIES ARE TO BE SENT AS FOLLOW: 8- MR E J FRITSCHI EXPEDITING DEPT THE RUST ENGINEERING CO 950 FORT DUQUESNE BLVD PITTSBURGH 22, PA. 1- PGHOFF- F J SIMONITCH- E&S 2- LOS ANGELES OFF- E &S A J CHURCHILL 1- PHOENIX OFF- D T QUISENBERRY T/S- PGHOFF- J J RICE-O/S
			NOTE-7- COPIES OF (U) PROPOSAL SHOULD BE SECURED FROM P L O'[illegible] S/ALES DEPT, SOUTH PHILA WORKS XXX

SHEET CONTINUED FINAL

CKNOWLEDGMENT
ON

Westinghouse Electric Corporation

25

DATE

REFER TO OUR ORDER

GO SG- 86081- T1

WT.	ITEM	QUANTITY	IDENTIFICATION AND DESCRIPTION
	1	1	25,000 KW TURBINE GENERATOR PER (W) PROPOSAL DATED MAY 12, 1950 PREPARED FOR THE RUST ENGINEERING CO FOR SOUTHWEST FOREST INDUSTRIES INC.
	2	13	COPIES OF INSTRUCTION BOOKS (INCLUDING RENEWAL PARTS DATA) 8- MR E J FRITSCH ,EXPEDITING DEPT THE RUST ENGINEERING CO 950 FORT DUQUESNE BLVD PGH 22, PA 1- PGHOFF- E &S F J SIMONITSCH 3- LOS ANGELES OFF- E&S A J CHRUCHILL 1- PHOENIX OFF- D T QUISENBERRY T/S PGHOFF- JJ RICE 0/3
	2		INSTALLATION SERVICE (PAGES "4B-" AND "5B" OF PROPOSAL

SHEET 3 CONTINUED FINAL A3

(KKK) Deft's Dep Ex 12 8-4-67

APPOINTMENT OF AGENT

SOUTHWEST FOREST INDUSTRIES, INC., a Nevada corporation, herein called Southwest, hereby appoints James A. Staley of Pittsburgh, Pennsylvania, as its agent for the sole purpose of signing purchase orders to be issued in its name in connection with the construction of a pulp and paper mill and related facilities near Snowflake, Arizona. Specifically, the authority hereby granted is limited to the signing of purchase orders issued pursuant to Section "C" of Article I of an engineering and construction contract between Southwest and The Rust Engineering Company, dated May 17, 1960, which contract is made part hereof by reference.

It is understood that purchase orders signed by James A. Staley within the scope of the authority herein granted shall be binding only upon Southwest and the Vendor and shall in no way be binding upon or obligate The Rust Engineering Company,

The authority hereby granted by Southwest to James A. Staley may be revoked by Southwest at any time by an appropriate notice of revocation in writing. The exercise of the right of revocation hereby reserved to Southwest shall

in no way affect the validity of purchase orders signed by James A. Staley prior to the receipt by him of written notice of revocation.

On purchase orders issued hereunder, James A. Staley shall use the title "Agent". It will not be necessary to make any further reference on the purchase order to this agency agreement.

SOUTHWEST FOREST INDUSTRIES, INC.

By _____

Dated June 14, 1960

I hereby accept the above appointment as Agent.

_____
JAMES A. STALEY

Dated June , 1960

E-8235-SW-5002
July 6, 1950
Steamhill-5
Southwest Forest Ind
E-8235

Delivery to be made within 90 days from date of letter of award (7/6/50)
Rail Freight

(continued on page 2)

Q-P-13

E-8285-SW-5002
July 6, 1960 1

ughouse Electric Corporation JWR:EMS
2

Listed price is firm and not subject to escalation.

Please prepay transportation charges and show as a separate item on invoices.

This purchase is an Interstate Commerce Transaction and is therefore exempt from Sales Tax, and it is not subject to the Arizona Use Tax because the material purchased is not manufactured or stored in a warehouse in Arizona.

Attached hereto and made a part of this purchase order is form titled, "Instructions for Transmittal of Shop Drawings and Data." Please abide by these instructions.

PROGRESS PAYMENTS SCHEDULE:

$284,200.00	with order, upon presentation of invoice
$ 53,230.00	February, 1961
$ 82,000.00	March, 1961
$ 82,000.00	April, 1961
$ 82,000.00	May, 1961
$ 82,000.00	June, 1961
$221,810.00	20% upon shipment
$166,357.50	15%-30 days after shipment
$ 55,452.50	5% upon acceptance or 120 days after shipment

Confirming "Letter of Intent" dated June 6, 1960 to Mr. J. J. Sherman - DO NOT DUPLICATE.

Shipping Point -
Lester, Pennsylvania See Above

James W. Bailey

PURCHASE ORDER

SOUTHW[illegible]T FOREST INDUST[illegible]S, INC.

PHOENIX, ARIZONA

2-4

ORDER NO
DATE July 6, 19[illegible]
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE

F O B CARS
DELIVERED BY TRUCK

TERMS

IMPORTANT INSTRUCTIONS — FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P O BOX 508, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The material covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the material covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

(1) The term "materials" used herein shall be understood to include articles and appliances of every nature and description being purchased hereunder.

(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.

(3) Shipment and delivery of the materials to be furnished hereunder shall be made as hereinbefore provided or as otherwise required by the progress of the work in which the materials are to be used, upon notice from the Purchaser or Engineer; and it is expressly provided that, as to performance on the part of the Vendor, time is and shall be considered of the essence of the contract.

(4) Should the Vendor, for any reason other than some fortuitous event beyond the control and without the fault or neglect of the Vendor, fail to make deliveries as required hereunder to the satisfaction of the Purchaser, or if the materials are not satisfactory to the Engineer, the Purchaser shall be at liberty to purchase the materials elsewhere, and any excess in cost of same over the price herein provided shall be chargeable to and paid by the Vendor on demand. Should any delay on the part of the Vendor (due allowance being made for contingencies provided for herein) occasion loss, damage or expense to the Purchaser or Engineer, the Vendor shall indemnify the Purchaser and Engineer against such loss, damage or expense. If, for any cause, all or any portion of the materials to be furnished hereunder are not delivered at the time or times herein specified, the Purchaser may, at his option, cancel this order as to all or any portion of materials not so delivered.

(5) The Vendor hereby covenants and agrees to indemnify and save harmless the Purchaser and Engineer against any and all claims or suits for infringement of patents or patent rights claimed to cover the Vendor's processes, products, materials, equipment, apparatus or appliances, such indemnity to include all costs and expenses which the Purchaser and Engineer may incur in defending any such actions that may result from the furnishing of any materials hereunder. The Vendor further covenants and agrees to undertake at the Vendor's own expense the defense of any and all such claims or suits.

(6) The Vendor shall not assign, sublet or otherwise dispose of the whole or any part of this order nor shall the Vendor assign any moneys due or to become due hereunder without the previous written consent of the Purchaser. Any attempt by the Vendor to so assign or dispose of any interest herein shall operate as an instant forfeiture and repudiation hereof by the Vendor and the rights of the parties shall be determined in the same manner as though the Vendor had at the time of such attempted assignment or disposal failed in and refused performance hereunder.

(7) The Purchaser agrees to pay to the Vendor, and the Vendor agrees to accept, as full compensation for the materials furnished hereunder the sum herein set forth, and such sum shall be paid in current funds by the Purchaser to the Vendor at the times and under the conditions herein set forth. Before any payment hereunder shall become due, the Purchaser at its option may require and the Vendor thereupon shall furnish satisfactory evidence of the payment of all accounts for labor and materials pertaining to Vendor's performance hereunder; and provided further that before any payment hereunder shall become due the Vendor shall, if required by the Purchaser, procure and furnish to the Purchaser full and complete release of liens from all persons furnishing labor and materials toward the performance hereof or, at the option of the Purchaser, satisfactory surety bond indemnifying the Purchaser against any claims based thereon.

(8) It is understood and agreed that any moneys due from the Purchaser to the Vendor hereunder may, at the option of the Purchaser, be applied by it to the payment of any indebtedness which may be owing by the Vendor to the Purchaser or to any subsidiary, affiliated or associated company of the Purchaser.

(9) It is agreed that no certificate given or payment made on account of this order shall be conclusive evidence of delivery and acceptance of materials hereunder, either wholly or in part, or shall be construed as acceptance of defective or improper materials.

(10) The Purchaser shall have the right to make changes in this order. If such changes affect the price specified herein to the Purchaser, the Vendor shall secure approval in writing of any change in price before proceeding.

(11) The Vendor further agrees that he shall within ten (10) days from date of notice to furnish same, at the option of the Purchaser, provide the Purchaser with a bond in full amount of this order, conditioned for the faithful performance thereof in all its particulars, duly executed with a surety company designated by the Purchaser, as surety, and in form and contents acceptable to the Purchaser; the cost of said bond to be borne by the Purchaser.

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA
JWL:SJA

ORDER NO P-0285-SA-5
DATE July 6, 196
REQUISITION Stoomill-
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MU
BE SHOWN ON ALL SHIPMEN
INVOICES AND CORRESPONDEN

Westinghouse Electric Corporation

Page 2

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Listed price is firm and not subject to escalation. Please prepay transportation charges and show as separate item on invoices. DRAWING REQUIREMENTS: Please refer to attached "Instructions for Transmittal of Shop Drawings and Data" for details on approval and Transmittal drawings; operating, maintenance and installation instructions; spare parts and recommended stock spare parts lists. Confirming "Letter of Intent" dated June 6, 1960 to Mr. J. J. Sherman - DO NOT DUPLICATE. PROGRESS PAYMENTS: $284,200.00 with order, upon presentation of invoice. SCHEDULE: 53,292.00 February, 1961 84,323.00 March, 1961 84,323.00 April, 1961 84,323.00 May, 1961 84,323.00 June, 1962 228,870.00 20% upon shipment 168,653.00 15%-30 Days after shipment 56,043.00 5% Upon acceptance or 120 Days after shipment	

F O B CARS Shipping Point - Leeber, Pennsylvania
DELIVERED BY TRUCK

TERMS Sec Notes

IMPORTANT INSTRUCTIONS — FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICE DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases consti an unqualified acceptance of all the terms and conditions of this order by the vendor

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

Order No. 8285-SW-5002

INSTRUCTIONS FOR TRANSMITTAL OF SHOP DRAWINGS AND DATA

Shop Drawings and Transmittal Letter Shall Show the Following:

Purchaser's Name
Purchase Order and Requisition Numbers
Purchaser's Drawing and/or Specification Number
Revised Drawings shall be so marked and dated

Drawings and Data Required for Approval

Within . . . . . .days after award of Purchase Order, Vendor shall send required copies of DRAWINGS, Data and two (2) copies of TRANSMITTAL LETTER TO:

The Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 22, Pennsylvania
Attention: Mr. E. J. Fritschi

The above instructions also apply for revised drawings resubmitted for approval.

Drawings and Data Required After Approval as Listed Below:

After approval, Vendor shall transmit the required copies of drawings, data and two (2) copies of TRANSMITTAL LETTER TO:

The Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 22, Pennsylvania
Attention: Mr. E. J. Fritschi

DRAWING & DATA REQUIREMENTS

Copies required:

7	Drawings for Approval
12	Final Approved Drawings
6	Instruction Manuals
6	Spare Parts Lists
	Reproducible Tracings
	Test Certificates

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHENIX, ARIZONA

Rev. 1
8285-S M-5002
ORDER NO 7-19-60
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

Westinghouse Electric Corporation
305 Beech Avenue - Union Bank Building
Pittsburgh 22, Pennsylvania
Attn: Mr. J. J. Sherman

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Please revise original Order 8285-SM-5002 as follows: DELETE: Paragraph referring to prepaying transportation charges and instead bill transportation charges as F.O.B. S.P.--Freight Collect. Estimated Rail Freight Charges - $12,650.00. All other terms and conditions of original order to remain the same. W ORDER PG. S 5 5 / In referring to this order please use this number as a reference. Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.	

F O B cars S.P. Losser, Ia. | TERMS

DELIVERED BY TRUCK

IMPORTANT INSTRUCTIONS **FOUR** COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

Baker

PURCHASE ORDER

SOUTHW[illegible]T FOREST INDUST[illegible]ES, INC.

PHOENIX, ARIZONA

Purchase General

JAN 1961
RECEIVED
R. E. BAKER

ORDER NO
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

WHEN TO SHIP

O: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

ANTITY	ARTICLE	PRICE
		ORDER PG 88081-T. In ref[illegible] to this order please use this number as reference. Order subject to [illegible] specified in [illegible]. Copy form of [illegible]

CARS	TERMS
REO BY TRUCK	

RTANT
ICTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 903, PHOENIX, ARIZONA

vance will be made for packing, cartage or crating unless stated above.
chaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
erials covered hereby are intended particularly for use on the job indicated above
t and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute alified acceptance of all the terms and conditions of this order by the vendor

ACKNOWLEDGMENT DATE _____

e foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

Kaker

[redacted]

Ac[illegible] Power Electric Corporation — 8235-[illegible]-5003. Rev. 11/5/80

ITM #	QTY	
3	1	[illegible] shall be furnished with provisions for connecting a neutral [illegible] position or full of Neutral S-1.

Price [illegible]

4	1	Scan Annunciator for the [illegible], including "Scan" S-Line back lit[illegible] mounted separately, 32 plug-in model 765-9 with [illegible] acknowledge push-button [illegible] 115 VAC 60 [illegible] manufactured by Scan Corp., Chicago, Illinois. (Drawing pressure page to be [illegible] order [illegible].)

Price [illegible]

5	1	Turbine [illegible]-up panel 90° high and 30" deep shall be furnished to match [illegible] in buyer's plant. Instal[illegible] shall be [illegible] and shall be standard black [illegible]. The panel shall include the following: (Price was included in original order balance is additional)

A. Oil [illegible] panel as outlined in Seller's Proposal (included)

B. Steel [illegible] for first stage, initial and [illegible] pressure, and 150 psi steam header pressure (included)

C. [illegible] ADD - $200.00

D. [illegible] ADD - $200.00

E. [illegible] for (incl. [illegible])

F. [illegible] ADD - 50.00

G. [illegible] ADD - $200.00

H. [illegible] ADD - $50.00

I. [illegible] with [illegible] high and 6 long ADD - $[illegible]

Cont'd on page 3

Order

PURCHASE ORDER

SOUTHW[illegible]ST FOREST INDUST[illegible]ES, INC.

PHOENIX, ARIZONA

ORDER NO Rev. #8
DATE 8/25-27-51
REQUISITION 11/9/50
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

JWR/dsk

nghouse Electric Corporation

WHEN TO SHIP

o: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

NTITY	ARTICLE	PRICE
QTY	The annunciator points shall be as follows: 1.) Low vacuum 2.) Low oil pressure 3.) High/low oil tank rise level 4.) High/low condensate level 5.) High bearing temperature 6.) Seal oil trouble 7.) D. C. to hydrogen panel 8.) High water level 9.) High 50 lbs. steam temperature 10.) High 150 lbs. steam temperature 11.) High 150 lbs. steam temperature 12.) High condensate collection tank level 13.) High 225 lbs. steam temperature 14.) Turning gear and gauge 15.) Four spare annunciator points Price	$5 [illegible]
	TAG: THRUST BEARING INSTRUMENTATION	
8	Thermocouples for installation in thrust bearing sho with leads brought out to convenient terminal block Price	$80.00
	TOTAL NET INCREASE	$26,072.[illegible]

CARS
EO BY TRUCK

TERMS

Cond. on page 4

TANT
CTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

nce will be made for packing, cartage or crating unless stated above.
haser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
rials covered hereby are intended particularly for use on the job indicated above.
and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute ified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

ORDER NO.
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER
BE SHOWN ON ALL SHIPM
INVOICES AND CORRESPOND

Westinghouse Electric Corporation

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	$1,100,050.00 37,073.00	
	$1,137,123.00	

F O B CARS
DELIVERED BY TRUCK

TERMS

IMPORTANT INSTRUCTIONS FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTIC
DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases const
an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein

_____

_____

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

Rev.-3
ORDER NO [illegible]-5002
DATE December 1, 1960
REQUISITION W.L.Churchill
JOB Southwest Forest Ind.
CONTRACT P-2025

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

Engineers Electric Corporation
Fourth Ave. - Union Bank Bldg.
Pittsburgh 22, Pennsylvania
Attention: Mr. J. J. Sherman

JHR:DHS

WHEN TO SHIP

TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Please revise our original order 8005-CH-5002 as follows: GENERAL: Schedule of Progress Payments to be made against this purchase order in accordance with new total order price (Ref. Rev. #2) and following revised schedule: Progress Payments: $284,200.00 with order upon presentation of invoice. Progress Payment: Date $ 53,075.00 - February, 1961 $ 86,000.00 - March, 1961 $ 85,000.00 - April, 1961 $ 85,000.00 - May, 1961 $ 85,000.00 - June, 1961 $227,484.60 - 20% upon shipment $170,613.45 - 15% - 30 days after shipment $ 56,855.15 - 5% upon acceptance or 120 days after shipment $1,137,123.60 - Present total price of order All other terms and conditions of original order shall remain the same.	ORDER PO 8208-11 (W) In referring to this order please use this number as a reference. Order accepted subject to conditions outlined in attached W. L. Corp. form of acknowledgment.

R. CARS

DELIVERED BY TRUCK

TERMS

IMPORTANT INSTRUCTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

Allowance will be made for packing, cartage or crating unless stated above.
Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

PURCHASE ORDER

SOUTHW[illegible]T FOREST INDUST[illegible]S, INC.

PHOENIX, ARIZONA

ORDER NO
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

JAN 1961
RECEIVED
P-E BAKER

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE

ORDER PG X8681

In referring to this order please use this number as a reference

Order accepted subject to condition

F O B CARS
DELIVERED BY TRUCK

TERMS

IMPORTANT INSTRUCTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P O BOX 900, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The material covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

(XXX)

ondon-A
rhill
.c-7 R.M.McCune
ng E.M.Hutchins
R.E.Baker ✓
AEC

ight
hnison

8285-11A
December 15, 1960
H.K.Steenhill
Southwest Forest
E-8285

ouse Electric Corporation JWR:EWS
th Ave. - Union Bank Bldg.
gh 22, Pennsylvania
. J. Sherman

When requested by job
superintendent

The Rust Engineering Company
Snowflake
Arizona

This purchase order covers Field Erection Engineering Supervision Services as outlined on Pages 4-B and 5-B of Westinghouse proposal dated May 18, 1960, in connection with the purchase by ✓ Southwest Forest Industries, Inc., Snowflake, Arizona, of one (1) 25,000 KW Indoor, Double Controlled Extraction Condensing Turbo-Generator Unit, on purchase order E-8285-SW-5002.

All for the sum of - - - $15,300.00

Listed price is firm and not subject to escalation.

Tax exempt. (No material).

Delivered - Job Site
Snowflake, Arizona

90% of invoice as approved, within 20 days of receipt. 10% - 30 days after completion and acceptance.

/////

7-7301

J. W. Rupe
Purchasing Department

//////////////

Appendix II

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

REPLY TO COUNTERCLAIM

Plaintiff, Southwest Forest Industries, Inc., by and through its attorneys, replies to defendant's counterclaim as follows:

I

Admits that on or about July 6, 1960, defendant sold and plaintiff purchased a turbine generator unit from defendant for the price of $1,137,123.00 and that said unit was delivered and installed on or about December 20, 1961 but denies that said unit was then accepted by plaintiff.

II

Admits that plaintiff has paid all of the purchase price to defendant except the sum of $57,082.20 but denies that said sum is now due and owing to defendant since the same should be offset against any judgment which plaintiff might obtain by virtue of its complaint herein.

WHEREFORE, plaintiff prays that defendant take nothing by its counterclaim.

SNELL & WILMER
By: /s/ BUR SUTTER
Attorneys for Plaintiff

400 Security Building
Phoenix, Arizona 85004

COPY of the foregoing "Reply To Counterclaim" mailed this 10th day of February, 1964, to:

LEWIS, ROCA, SCOVILE, BEAUCHAMP & LINTON
Attn: Mr. Don A. Davis
Title and Trust Building
Phoenix, Arizona

Attorneys for Defendant
/s/ BURR SUTTER
Burr Sutter

Filed Jul 24 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDED COMPLAINT

Plaintiff complains of defendant and for its cause of action alleges:

COUNT ONE

I.

Plaintiff is a corporation organized under the laws of the State of Nevada and duly qualified to do business in the State of Arizona. Defendant is a corporation organized under the laws of the State of Pennsylvania and is duly qualified to do business in the State of Arizona and is doing business in the District of Arizona.

II.

The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

III.

On or about June 6, 1960, plaintiff ordered from defendant a machine commonly known as a turbine generator unit to be installed in plaintiff's Kraft and Newsprint paper mill near Snowflake, Arizona.

IV.

Defendant accepted said order and manufactured a turbine generator unit which it knew was to be the sole source of electric energy for plaintiff's mill. Defendant also knew that said mill could not be operated unless the equipment performed properly.

V.

The turbine generator unit was delivered to plaintiff's plant and installed and placed in operation on or about December 20, 1961.

VI.

Defendant negligently manufactured said turbine generator unit so that the same failed to function and perform. As soon as plaintiff ascertained that the equipment was defective, it notified defendant to that effect and defendant undertook to repair the same but such repairs were negligently made and failed to remedy the defects caused by defendant's negligence in the manufacture of such equipment.

VII.

Defendant's negligence caused damage to plaintiff in that plaintiff was required to shut down the operation of its mill for long periods until at least April 9, 1962, and plaintiff has suffered damage by reason of lost time, labor and materials and loss of business as a result of defendant's negligence.

VIII.

Plaintiff did not know and could not by the exercise of reasonable diligence have learned of defendant's negligence until after the turbine generator unit was installed and placed in operation. By reason of the aforesaid, plaintiff was damaged in the sum of Six Million Dollars ($6,000,000.00).

Wherefore, plaintiff prays:

1. For judgment against the defendant in the sum of Six Million Dollars ($6,000,000.00).

2. For its costs and disbursements incurred herein; and
3. For such other and further relief as may be proper in the premises.

SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, by its attorney, and submits its Supplemental Complaint as follows:

I.

The plaintiff, on or about December 17, 1963, filed its original Complaint herein.

II.

After the original Complaint was filed, plaintiff discovered additional defects in the turbine generator unit sold and furnished by defendant to plaintiff. Such defects were in the exciter, an integral and essential part of the turbine generator unit, and were proximately caused by defendant's negligence in manufacturing such equipment. As soon as plaintiff discovered that the exciter was defective, it notified defendant of that fact and defendant failed and refused to make necessary repairs or to remedy such defect.

III.

Plaintiff did not know and could not by the exercise of reasonable diligence have learned of defendant's negligence in the manufacture of the exciter prior to July 14, 1964.

IV.

Defendant's negligence aforesaid proximately caused additional damage to plaintiff in the sum of $150,000.00.

Wherefore, plaintiff prays judgment for damages in the additional sum of One Hundred Fifty Thousand Dollars ($150,000).

COUNT TWO

I.

Plaintiff refers to paragraphs I, II, III, IV and V of Count One and the Supplement thereto and by this reference incorporates the same herein as though fully set forth.

II.

The said turbine generator unit was defective in design, materials, manufacture and assembly.

III.

The defects in the said turbine generator caused damage to plaintiff in that plaintiff was required to shut down the operations of its mill for long periods until at least April 9, 1962, and plaintiff has suffered damage by reason of lost time, labor and materials and loss of business as a result of the defects in said product designed, assembled and manufactured by defendant.

IV.

Plaintiff did not know and could not, by the exercise of reasonable diligence, have learned of the said defects until after the said turbine generator unit was installed and placed in operation. By reason of the aforesaid, plaintiff was damaged in the sum of $6,000,000.00.

Wherefore, plaintiff prays:

1. For judgment against the defendant in the sum of $6,000,000.00.
2. For its costs and disbursements incurred herein, and
3. For such other and further relief as may be proper in the premises.

COUNT THREE

I.

The claim set forth in this Count arose under the Anti-Trust laws of the United States, particularly Section 4 of the Clayton

Act (15 U.S.C. Sec. 15) and Section 1 of the Sherman Act (15 U.S.C. Sec. 1).

II.

Plaintiff is now and at all times herein mentioned was a corporation organized and existing under the laws of the State of Nevada and duly qualified to do business in the State of Arizona. Plaintiff's primary business is carried on in the State of Arizona.

III.

Defendant is a corporation organized and existing under the laws of the State of Pennsylvania, is qualified to do business in Arizona, has its principal place of business in the City of Pittsburgh, Pennsylvania and manufactures turbine generator units at Lester, Pennsylvania and Sunnyvale, California.

IV.

General Electric Company, Allis-Chalmers Manufacturing Company, Carrier Corporation, DeLaval Steam Turbine Company and Worthington Corporation (hereinafter sometimes called the "co-conspirators") participated in the combination and conspiracy hereinafter alleged and are hereby named as co-conspirators. General Electric Company is a corporation organized and existing under the laws of New York. Allis-Chalmers Manufacturing Company, Carrier Corporation and Worthington Corporation are corporations organized and existing under the laws of the State of Delaware. DeLaval Steam Turbine Company is a corporation organized and existing under the laws of the State of New Jersey.

V.

At all times herein mentioned, defendant and corporate co-conspirators were the principal manufacturers of turbine generator units in the United States with plants located in California, Massachusetts, New Jersey, New York, Pennsylvania and Wisconsin and they and each of them were engaged in manufacturing, selling, shipping and delivering such units in interstate commerce to purchasers throughout the United States, including plaintiff in the District of Arizona.

VI.

Beginning at least as early as January 1, 1951, and continuing until on or about the 1st day of July, 1960, defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in turbine generator units in violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1). The combination and conspiracy consisted of a continuing agreement, understanding and concert of action among defendant and co-conspirators among other things:

(a) To fix and maintain prices, terms and conditions for the sale of turbine generator units, including the prices, terms and conditions for sale to plaintiff;

(b) To submit non-competitive, collusive and rigged bids and price quotations for supplying turbine generator units to purchasers throughout the United States, including plaintiff.

VII.

In furtherance of the aforesaid combination and conspiracy, representatives of defendant and co-conspirators met from time to time to discuss the price, terms and conditions for the sale of turbine generator units and to establish bids and quotations to be made to particular prospective customers. At some of such meetings, or as a result thereof, it was agreed that defendant and corporate co-conspirators would change the prices, terms and conditions for the sale of turbine generator units and that one of them would be designated as having "position" in regard to the sale of a turbine generator unit or units to a particular prospective customer. Pursuant to such agreements, defendant and co-conspirators increased the price of a turbine generator unit offered to and purchased by plaintiff and changed the terms and conditions for the sale of such unit to plaintiff, all of which caused injury and damage to plaintiff's business and property as hereinafter set forth.

VIII.

The effects of the aforesaid combination and conspiracy were that:

(a) Prices of turbine generator units throughout the United States, including the price charged plaintiff, were raised to, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of turbine generator units throughout the United States, including the sale to plaintiff, was restrained, suppressed and eliminated;

(c) Purchasers of turbine generator units throughout the United States, including plaintiff, were deprived of the benefits of free competition in the purchase of these products;

(d) Purchasers of turbine generator units throughout the United States, including plaintiff, did not receive competitive bids and quotations; and

(e) Purchasers of turbine generator units throughout the United States, including plaintiff, were forced to pay artificially fixed prices for such units which were higher than the price they would have paid had no such combination and conspiracy existed.

IX.

On the 29th day of June, 1960, a criminal proceeding was instituted by the United States in the United States District Court for the Eastern District of Pennsylvania, entitled "United States of America vs. General Electric Company, Allis-Chalmers Manufacturing Company, Westinghouse Electric Corporation, et al.", Criminal Action No. 20401, for the purpose of punishing defendant and others for the aforesaid violation of Section 1 of the Sherman Act. Defendant pleaded guilty to the indictment on December 8, 1960. Judgment of guilty was entered on this plea and sentence was imposed by the Court on February 6, 1961.

X.

On or about June 6, 1960, plaintiff purchased a turbine generator unit from defendant for the price of $1,137,123., all of which has been paid except the sum of $57,087.20. By reason of the aforesaid combination and conspiracy, plaintiff was denied the benefit of unrestricted competition in the price of turbine generator units and paid for such unit a price which was substantially

in excess of the price which it would have paid under conditions of unrestricted competition had such combination and conspiracy not existed. Plaintiff is informed and believes and on that ground alleges that, by reason of the aforesaid combination and conspiracy, the price paid for the turbine generator unit purchased by it exceeded the price which it would have paid had said combination and conspiracy not been in existence by at least $250,000.00.

Wherefore, plaintiff prays:

1. That plaintiff's damages be determined and the actual amount of its damages be trebled as required by law;
2. That plaintiff be granted its costs of litigation herein, including reasonable attorneys' fees as required by law, and
3. That plaintiff have such other and further relief as the Court may deem just and reasonable.

Dated as of the 19 day of July, 1967.

SNELL & WILMER
By /s/ ROGER W. PERRY
400 Security Building
Phoenix, Arizona
Attorneys for Plaintiff

COPY of the foregoing
delivered this 19th
day of July, 1967, to:

John J. Flynn
LEWIS, ROCA, BEAUCHAMP & LINTON
114 West Adams Street
Phoenx, Arizona 85003

Attorneys for Defendant
/s/ ROGER W. PERRY

Filed Jul 21 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, for its answer to the amended complaint filed on July 19, 1967, admits, denies and alleges as follows:

I

Defendant admits the allegations of paragraphs I and II which relate to the status of the parties and the amount in controversy.

II

Admits the allegations of paragraph III except alleges that plaintiff ordered the unit from the defendant on or about July 6, 1960.

III

Defendant denies the allegations of paragraph IV and alleges that the turbine generator unit was manufactured in accordance with the specifications furnished it by the plaintiff and the Rust Engineering Company, a firm employed by the plaintiff to determine such specifications.

IV

Admits the allegations of paragraph V to the effect that the generator unit was delivered, installed and placed in operation but alleges that the unit was installed and operational by October 15, 1961, rather than December 20, 1961, as alleged.

V

Defendant denies the allegations of paragraphs VI, VII and VIII of plaintiff's complaint except as to the allegation that defendant did perform service upon the unit after delivery and installation.

VI

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

VII

Plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

ANSWER TO SUPPLEMENTAL COMPLAINT

I

Admits the allegations of paragraph I of the Supplemental Complaint.

II

Denies the allegations of paragraphs II, III and IV of the Supplemental Complaint.

III

If plaintiff was damaged in the sum alleged or any other sum such damages were solely caused by or contributed to by the negligence of plaintiff and plaintiff assumed the risk of such damages, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

ANSWER TO COUNT TWO

I

Defendant incorporates by reference its answer to Count One and to the Supplemental Complaint as though fully set forth herein.

II

Denies the allegations of paragraphs II, III and IV of Count II.

III

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

V

Count Two fails to state a claim upon which relief may be granted.

ANSWER TO COUNT THREE

I

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph I of Count Three of plaintiff's complaint, and therefore denies the same.

II

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph II of Count Three of plaintiff's complaint, and therefore denies the same.

III

Defendant admits the allegations of paragraph III.

IV

This defendant denies the existence of any combination or conspiracy referred to in paragraph IV and is without information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph IV of Count Three of plaintiff's complaint, and therefore denies the same.

V

Defendant admits that it has engaged and is now engaging in the manufacture and sale in interstate commerce of turbine generators. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph V, and therefore denies the same.

VI

Defendant denies the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

Defendant admits the allegations of paragraph IX, but it further avers that it did not admit the allegations of the indictment and that each and every allegation of paragraph IX is irrelevant and immaterial to any claim that may be stated by the complaint.

X

Defendant denies the allegations of paragraph X except to admit the purchase price of the turbine generator unit and the amount remaining unpaid by the plaintiff for same as alleged.

Wherefore, having fully answered plaintiff's complaint, the defendant requests that it be dismissed, that it recover its costs of suit, that it have judgment against the plaintiff in accordance with its counterclaim filed herewith.

COUNTERCLAIM

Defendant, for its counterclaim against plaintiff, alleges:

I

On or about July 6, 1960, plaintiff purchased from defendant a turbine generator unit for the agreed price of $1,137,123. The generator unit was delivered, installed and was operational on or about October 15, 1961.

II

Plaintiff has failed to pay $57,082.20 of the purchase price, which sum is now due and owing to the defendant and has been since December 15, 1961, pursuant to the terms of the agreement between the parties.

Wherefore, defendant prays for judgment against plaintiff on its counterclaim in the sum of $57,082.20 with interest thereon at the legal rate from December 15, 1961, until paid, for its

costs of suit herein, and for such other and further relief as to the court may seem proper.

LEWIS ROCA BEAUCHAMP & LINTON
By /s/ JOHN J. FLYNN
John J. Flynn
Attorneys for Defendant

Copy of the foregoing delivered
this 21 day of July, 1967, to:

Roger W. Perry and
Burr Sutter
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Plaintiff

/s/ JOHN J. FLYNN
John J. Flynn

Filed—Jul 31 1967
Lodged—Aug 2 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDMENT OF COMPLAINT—JULY 29, 1967

COUNT FOUR

I

Plaintiff refers to Paragraphs I, II, III and IV of COUNT ONE of this complaint and by this reference incorporates the same herein as though fully set forth.

II

Plaintiff purchased the aforesaid turbine generator unit to be the sole source of electric energy for a Kraft and Newsprint paper mill near Snowflake, Arizona.

III

Defendant had knowledge of the purpose for which said turbine generator unit was purchased and then and there warranted the same to be in all respects fit, proper and adequate for such purpose.

IV

Plaintiff relied on said warranties, but the equipment was defective in design, materials, manufacture, assembly and workmanship and was inadequate and unsuited for use in plaintiff's business in that it failed to provide electric energy at the times and in the quantities required for the operation of plaintiff's mill.

V

As soon as said defects in design, manufacture, materials, workmanship, assembly and unfitness of the equipment was ascertained, plaintiff notified defendant and defendant thereupon undertook to remedy the defects in said equipment but negligently failed to do so.

VI

Plaintiff agreed to pay the sum of $1,137,123.00 for said equipment and has paid all of said sum except $57,087.20.

VII

As a direct and proximate result of the aforesaid breaches of warranty in the sale of said equipment and in defendant's attempts to correct said defects and to repair the equipment, plaintiff has suffered damage in lost time, labor and materials and loss of profits and in overhead expenses while, by reason of the defects in the equipment, plaintiff's mill was totally or partially shut down.

VIII

By reason of the aforesaid, plaintiff has been damaged in the sum of Five Million Dollars ($5,000,000.00).

Wherefore plaintiff prays:

1. For judgment against defendant in the sum of Five Million Dollars ($5,000,000.00);
2. For its costs and disbursements incurred herein; and
3. For such other and further relief as may be proper in the premises.

Dated this 31st day of July, 1967.

SNELL & WILMER
By /s/ ROGER W. PERRY
Roger W. Perry
400 Security Building
Phoenix, Arizona 85004
Attorneys for Plaintiff

COPY of the foregoing
Amendment of Complaint—
July 29, 1967 delivered
this 31 day of July,
1967 to:

John J. Flynn
LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON
114 West Adams Street
Phoenix, Arizona 85003
Attorneys for Defendant

/s/ ROGER W. PERRY

Filed Aug 7 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDED ANSWER AND COUNTERCLAIM TO PLAINTIFF'S AMENDED COMPLAINT FILED AUGUST 7, 1967

Defendant, for its answer to the amended complaint filed on August 7, 1968, admits, denies and alleges as follows:

ANSWER TO COUNT ONE

I

Defendant admits the allegations of paragraphs I, II, III, and IV.

II

Admits the allegations of paragraph V to the effect that the generator unit was delivered, installed and placed in operation but alleges that the unit was installed and operational by October 15, 1961, rather than December 20, 1961, as alleged.

III

Defendant denies the allegations of paragraphs VI, VII and VIII of plaintiff's complaint except as to the allegation that

defendant did perform service upon the unit after delivery and installation.

IV

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

V

Plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

ANSWER TO SUPPLEMENTAL COMPLAINT

I

Admits the allegations of paragraph I of the Supplemental Complaint.

II

Denies the allegations of paragraphs II, III and IV of the Supplemental Complaint.

III

If plaintiff was damaged in the sum alleged or any other sum such damages were solely caused by or contributed to by the negligence of plaintiff and plaintiff assumed the risk of such damages, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

ANSWER TO COUNT TWO

I

The court has granted summary judgment as to Count II.

ANSWER TO COUNT THREE

I

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph I of Count Three of plaintiff's Complaint, and therefore denies the same.

II

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph II of Count Three of plaintiff's complaint, and therefore denies the same.

III

Defendant admits the allegations of paragraph III.

IV

This defendant denies the existence of any combination or conspiracy referred to in paragraph IV and is without information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph IV of Count Three of plaintiff's complaint, and therefore denies the same.

V

Defendant admits that it has engaged and is now engaging in the manufacture and sale in interstate commerce of turbine generators. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph V, and therefore denies the same.

VI

Defendant denies the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

Defendant admits the allegations of paragraph IX, but it further avers that it did not admit the allegations of the indict-

ment and that each and every allegation of paragraph IX is irrelevant and immaterial to any claim that may be stated by the complaint.

X

Defendant denies the allegations of paragraph X except to admit the purchase price of the turbine generator unit and the amount remaining unpaid by the plaintiff for same as alleged.

ANSWER TO COUNT FOUR

I

Defendant adopts by reference the answers given to paragraphs I, II, III and IV of Count One and incorporates them herein.

II

Defendant admits the allegations of paragraph II.

III

Defendant denies that it had knowledge of the purpose for which the unit was purchased. Defendant denies that it warranted the same as proper and adequate for such purpose. Defendant affirmatively alleges that it relied upon the specifications furnished by Rust Engineering Company, a firm employed by plaintiff to determine such specifications, and manufactured a unit precisely in accordance with said specifications.

IV

Defendant denies the allegations of paragraph IV and affirmatively alleges that if the unit was not adequate or suited for use in plaintiff's business, that the responsibility lies in the specifications furnished to the defendant by the Rust Engineering Company, a firm employed by the plaintiff to determine such specifications, which specifications were precisely followed in the manufacturing of the unit.

V

Defendant denies the allegations of paragraph V, except to allege that the defendant did perform some service on the unit after delivery and installation.

VI

Defendant admits the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

As a further and affirmative defense the defendant alleges that if plaintiff was damaged in the sum alleged or in any other sum such damage was solely caused by or contributed to by plaintiff's negligence or that plaintiff assumed the risk.

X

As a further and affirmative defense the defendant alleges that plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

Wherefore, having fully answered plaintiff's complaint, the defendant requests that it be dismissed, that it recover its costs of suit, that it have judgment against the plaintiff in accordance with its counterclaim filed herewith.

COUNTERCLAIM

Defendant, for its counterclaim against plaintiff, alleges:

I

On or about June 6, 1960, plaintiff purchased from defendant a turbine generator unit for the agreed price of $1,137,123. The generator unit was delivered, installed and was operational on or about October 15, 1961.

II

Plaintiff has failed to pay $57,082.20 of the purchase price, which sum is now due and owing to the defendant and has been since December 15, 1961, pursuant to the terms of the agreement between the parties.

Wherefore, defendant prays for judgment against plaintiff on its counterclaim in the sum of $57,082.20 with interest thereon at the legal rate from December 15, 1961, until paid, for its costs of suit herein, and for such other and further relief as to the Court may seem proper.

LEWIS ROCA BEAUCHAMP & LINTON

By /s/ PAUL G. ULRICH
John J. Flynn
James Moeller
Paul G. Ulrich
Attorneys for Defendant

Copy of the foregoing delivered
this 7 day of August, 1967, to:

Roger W. Perry and
Burr Sutter
Snell & Wilmer
400 Security Bldg.
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Attorneys for Plaintiff

/s/ PAUL G. ULRICH
Paul G. Ulrich

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

OPINION

Southwest Forest Industries, Inc., a Nevada corporation (hereafter Southwest), which owns and operates a pulp and paper mill near Snowflake, Arizona, sued Westinghouse Electric Corporation, a Pennsylvania corporation (hereafter Westinghouse), claiming damages by reason of lost time, labor, materials, and loss of business as the result of the alleged (1) negligent manufacture of the turbine generator unit supplied to the Snowflake mill by Westinghouse, (2) negligent repair of the unit when defects caused by Westinghouse negligence in the manufacture of the equipment were discovered, and (3) negligent or other breach of warranty because the equipment supplied was inadequate and unsuited for use in plaintiff's business in that it failed to provide electric energy at the times and in the quantities required for the operation of the mill.[1] A supplemental complaint alleged negli-

1. The negligence allegations were further refined, in a joint pretrial statement, as follows:

"Plaintiff contends defendant was negligent in one or more of the following particulars:

"A. In the manufacture of the turbine generator unit by reason of leaving foreign materials in the control system of the unit.

"B. In the supervision of the installation of the control system of the unit at Snowflake, Arizona, by utilizing inadequate flushing procedures.

gence in the manufacture of an exciter unit, a part of the turbine generator unit, that was not discovered until after the original complaint had been filed. An additional amending count alleged that the turbine generator unit was defective in design, materials, manufacture and assembly, to "take advantage of the newly recognized doctrine of 'strict liability in tort'." The facts upon which the allegations of strict liability in tort and the resulting damages are based are the same as those alleged in support of the negligence and breach of warranty counts.[2]

After the trial of this matter had commenced, and testimony and exhibits had been received in evidence, Westinghouse renewed certain motions for partial summary judgment. Southwest agreed to this procedure and that there were no issues of material fact

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"C. In the repair of the control system after foreign materials were first discovered.

"D. In the design of a filtration system for the control system."

The factual basis of the breach of warranty claim was stated by the plaintiff to be the same as that of the negligence claim. In addition, Westinghouse counterclaimed for $57,082.20, the balance due on the purchase price of the turbine generator unit. The joint pretrial statement agreed that this amount was the unpaid balance, that in the event Southwest did not recover on its complaint Westinghouse was entitled to judgment on its counterclaim in that amount plus interest at 6% per annum from December 15, 1961, until paid, and that in the event Southwest obtained a judgment against Westinghouse, Westinghouse was entitled to an offset of $57,082.20.

2. Exhibits submitted by Southwest provide "the total dollar value of consequential damages claimed, together with mathematical computations supporting such claim." These include recovery of fixed operating costs for the period of delay in startup of the mill caused by difficulties with the turbine generator unit, the cost of repairs made by Rust Engineering Company to the turbine generator unit, and additional caustic (used in the papermaking process) purchased to offset that lost from the recovery boiler as a result of shutdown of the turbine, together with recovery of fixed operating costs and the cost of repairs relating to the exciter unit. No damages are claimed resulting from personal injuries or physical harm to property.

The damages sought resulting from the alleged improper manufacture, installation, and repair of the turbine generator unit were suffered between December 1961 and April 1962. Those resulting from the alleged improper manufacture of the exciter unit were suffered in July 1964.

with respect to the matters before the Court for decision.[3] The determination of these motions turns upon the terms and legal effect of various agreements entered into by the parties for the sale, erection, and installation of the turbine generator unit, together with a consideration of the policies supporting the doctrine of strict liability in tort. There follows a summary of the facts necessary for this determination.

Upon the completion of certain preliminary feasibility studies, Southwest[4] and Rust Engineering Company (hereafter Rust) entered into a formal agreement under which Rust was to construct the Southwest pulp and paper mill to be located near Snowflake, Arizona.[5] The total design, construction, purchase, and installation of the mill and its equipment were to be accomplished by Rust, as was the final decision as to what equipment was to be purchased for the mill.

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3. The parties also agreed that the Court might consider certain documents that had either been admitted into evidence at the trial or were attached as exhibits to designated depositions, that there existed no dispute as to any material facts necessary to decide the legal issues of what documents constituted the contract and whether Westinghouse was liable thereunder for the claimed consequential damages, that the specified exhibits were genuine in that they were what they purport to be, that the only question at this stage of the proceedings was the legal significance of the testimony and exhibits, in connection with the motion for summary judgment, and that neither side had any evidence to present contradicting or impeaching any of the testimony in the specified depositions.

4. Southwest was incorporated as a Nevada corporation on September 30, 1935. The Snowflake mill is one of several operating divisions of the company, others of which include logging operations and lumber mills. The consolidated balance sheet for the Snowflake division alone shows its assets to be in excess of $37,000,000 for the year 1962. The Snowflake mill employed 426 persons as of July 1964.

5. Article 1, paragraph C(10) of this agreement provided that Rust would "conduct its purchasing program and work in connection with the Project so as to obtain benefit from manufacturer's warranties with respect to, and guarantees of the performance of, machinery, equipment and other apparatus and facilities to be a part of the Project and to pass to Southwest, as soon as possible, all such manufacturer's warranties and guarantees." Supplementing the contract between Rust and Southwest was a separate agreement appointing a Rust purchasing officer as the purchasing agent to act on behalf of Southwest.

Pursuant to these agreements, Rust sent to Westinghouse on May 3, 1960, an invitation to bid on the turbine generator unit. While not a part of the contract between the parties, the invitation is significant in determining Rust's expectations.[6] Westinghouse then sent to Rust, on May 18, 1960, a formal proposal containing detailed specifications for the turbine generator unit. The first page of the proposal's covering letter stated that the proposal was "subject to the terms and conditions on the back of this quotation."[7]

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6. Paragraph 13 of the invitation included, with other requirements to be furnished with the proposal, the following:

> "GUARANTEE: Supplier shall be required to guarantee the performance of his equipment and the material furnished to the extent that he shall replace, f.o.b. job site, without additional cost to the owner, any unsuited to the purpose intended during the first year of use of same in active service, upon notice by the engineers or owner."

This guarantee was not a part of a standard request for quotations used by Rust, but was specially drafted for this particular Southwest order.

7. These terms and conditions included the following:

> "Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages. . . .
>
> "On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form."

In addition, the formal proposal itself, at page 5B, contained the following warranty with respect to installation and services:

> "Westinghouse warrants that the recommendations of the Field Engineer shall accurately reflect the best judgment of a qualified engineer in the premises, but no other warranty or obligation of any kind shall extend thereto or be implied therefrom and Westinghouse shall not be liable for any act or omission of those not its employes nor for any injury, loss, damage, delay, failure to operate, or other things whatsoever due in whole or in part to any cause other than failure of its engineering recommendations to fulfill such warranty. The liability of Westinghouse with respect to the Field Engineer's services shall not, in any event, exceed the cost of correcting defects in the apparatus, and Westinghouse shall not be liable for consequential damages."

On June 6, 1960, the Rust purchasing officer designated as Southwest's agent sent to Westinghouse a letter of intent,[8] upon which Rust expected Westinghouse to begin to prepare engineering drawings, start the work under the contract, and expend funds in its furtherance. Westinghouse next sent to Rust, on June 13, 1960, a form of acknowledgment,[9] which was eventually sent on to Southwest by Rust.

On July 6, 1960, the formal purchase order referred to in the Rust letter of intent of June 6, 1960, was sent to Westinghouse on a Southwest purchase order form.[10] This purchase order was received by Westinghouse, which, after determining the shipping date of the turbine generator unit, stamped on the face of the

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8. The letter of intent stated:

"It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit, generally in accordance with your above referenced proposal.

"However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand had been established for approximately 13½ months."

9. The face of the customer's copy of the acknowledgment form states: "See reverse side for terms and conditions." On the reverse side is a warranty identical to the warranty appearing as a part of the Westinghouse proposal.

10. The warranty contained in the Southwest purchase order form provided:

"(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder. . . .

"(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern."

purchase order (and each of the subsequent purchase orders received thereafter) a conditional acceptance[11] and returned it to Rust.

Revised copies of the Southwest purchase orders were sent by Rust to Westinghouse in October, 1960. These revisions removed from the original contract between Westinghouse and Southwest the erection and installation of the turbine generator unit, substituting an independent contract between Rust and Westinghouse for such services. The new erection and installation contract accepted page 5B of the original Westinghouse proposal, which contained a warranty substantially identical to the original Rust request for warranty and the warranty contained in the Westinghouse proposal.[12]

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11. The following Westinghouse stamp appears on the first page of each Southwest purchase order form:

"Order *PGS8081.*

"In referring to this order please use this number as a reference.

"Order accepted subject to conditions outlined in ~~attached~~ WE Corp form of acknowledgment."

The longhand notation, "will ship W/O [week of] 7/10/61, J. J. Rice 8/9/60," appears on the face of the first purchase order form. The word "attached" was lined out because the Westinghouse form of acknowledgment had previously been sent to Rust. See notes 7 and 9 *supra* for the Westinghouse form of acknowledgment.

Each Southwest purchase order form provided a space for signature and acknowledgment that "The foregoing order is hereby accepted by the Vendor subject to all terms and conditions set forth herein." On none of the Southwest purchase order forms was the space for acknowledgment signed.

12. See note 7, *supra.* Other facts before the Court show that Rust was requested by Southwest in August or September, 1962, to extend the Westinghouse warranty. Rust and Westinghouse exchanged correspondence, the effect of which was that the replacement portion of the warranty would be extended, but that no blanket extension of the warranty could be made. A Southwest memorandum dated April 9, 1962, refers to documents that Southwest's attorney would like to have in preparing an insurance claim for the damages suffered at the mill. This memorandum refers specifically to the form of warranty contained in the Westinghouse order acknowledgment form that had by that time been received by Southwest.

To the Court these facts also show at these late dates that Southwest clearly confirmed their understanding that it was the Westinghouse form of warranty, limited in time and obligation, that was applicable to the sale.

On July 24, 1967, some days prior to trial, the Court granted defendant's motion for partial summary judgment as to the damages claimed under the theory of strict liability in tort because the principles underlying the doctrine of strict liability in tort for defective products[13] were not applicable. All damages sought by Southwest in this case are consequential damages.[14] The turbine generator unit is a highly specialized, custom-built piece of machinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.

The circumstances of this case do not bring the plaintiff within the class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved sup-

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13. See, *e.g., Greenman v. Yuba Power Prods., Inc.,* 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Price v. Gatlin,* 241 Ore. 315, 405 P.2d 502 (1965); *Brewer v. Reliable Automotive Co.,* 240 Cal. App.2d 228, 49 Cal. Rptr. 498 (1966). *See generally* Restatement (Second) Torts § 402(A); Prosser, *The Fall of The Citadel—Strict Liability to the Consumer,* 50 Minn. L. Rev. 791, 822-23 (1966).

The *Seely* opinion, *supra,* makes it plain that law of warranty recovery for economic loss has not been entirely superseded by strict liability in tort in a commercial setting, that it is inappropriate to hold a manufacturer responsible for the quality of performance of its products in a purchaser's business unless it agrees that the product was designed to meet the purchaser's demands, and that the risk that the product will not meet the purchaser's economic expectations may fairly be charged to the purchaser unless the manufacturer agrees that it will bear that risk. There was no such agreement in this case.

14. See, *e.g., Monarch Brewing Co. v. George J. Meyer Mfg. Co.,* 130 F.2d 582 (9th Cir. 1942); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.,* 201 F. Supp. 191 (N.D. Ohio 1961); *Wallich Ice Machine Co. v. Hanewald,* 275 Mich. 607, 267 N.W. 748 (1936); *Ford Motor Co. v. Puskar,* 394 S.W.2d 1 (Tex. Civ. App. 1965); *Washington & O.D. Ry. Co. v. Westinghouse Elec. & Mfg. Co.,* 120 Va. 620, 89 S.E. 131 (1916), *reversed in part on rehearing on other grounds,* 91 S.E. 646 (1916).

port an extension of the doctrine of strict liability in tort to the present facts.[15]

With respect to the issues relating to the formation, interpretation, and validity of the agreements of the parties, the substantive law of Pennsylvania is controlling.[16] At all relevant times, the Uniform Commercial Code was there in effect and controls the legal result of the agreements here. The sections of the Code most directly involved are sections 2-204, 2-206, 2-207, and 2-719, relating to the formation of a contract and the ability of the contracting parties to limit their liability for consequential damages.[17]

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15. This conclusion has been confirmed with the decision by the Arizona Court of Appeals on July 27, 1967, of *O. S. Stapley Co. v. Miller* (not yet reported), which holds that the doctrine of strict liability in tort has been adopted in Arizona. The court, however, decided only that " 'a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being,' *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900, 27 Cal. Rptr. 697 (1962)." The *Stapley* court also approvingly cited *Rossignol v. Danbury School of Aeronautics*, 227 A.2d 418, 424 (Conn. 1967), in which the Connecticut court, applying the elements set forth in Restatement (Second), Torts § 402 A, required as a basis for recovery that the defective product cause "physical harm to the consumer or user or to his property." 227 A.2d at 424. See also *Bailey v. Montgomery Ward & Co.*, (Ariz. Ct. App., Aug. 17, 1967) (not yet reported). None of these elements is present here.

Arizona substantive law as to this count of the complaint applies where, as here, jurisdiction is based upon diversity of citizenship of the parties and the damages suffered occurred in Arizona. See, *e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *Maloy v. Taylor*, 86 Ariz. 356, 346 P.2d 1086 (1959); *Friedman v. Friedman*, 40 Ariz. 96, 9 P.2d 1015 (1932).

16. See, *e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Ross v. Ross*, 96 Ariz. 249, 393 P.2d 933 (1964); *Ruby v. United Sugar Companies, S.A.*, 56 Ariz. 535, 109 P.2d 845 (1941); *Schram v. Smith*, 97 F.2d 662 (9th Cir. 1938).

All purchase negotiations and documents material to this transaction were executed in Pennsylvania.

17. This case does not involve any attempted disclaimer of warranties, the subject of Uniform Commercial Code section 2-316. As comment (2) to that section indicates, U.C.C. sec. 2-316(4) provides that questions of limitation of remedy are governed by U.C.C. secs. 2-718 and 2-719, and are "in no way affected by" U.C.C. sec. 2-316, which describes the manner in which the warranties themselves may be modified or excluded entirely from an agreement. 12 A. Purdon's Pa. Stat. Ann. 192, 193 (perm. ed. 1954).

At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgment form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's "Amendment of Complaint—July 29, 1967", cannot reasonably be explained on any other basis.[18] By every objective test there was an agreement as to the nature of the con-

18. There were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse.

The Rust letter of invitation appended a form of warranty specifically tailored for the Southwest contract. The form of warranty was, setting aside for the moment the consequential damage limitation, substantially the same as the Westinghouse warranty. When the Westinghouse proposal was received, a copy of it was sent to Southwest. Southwest commented upon the proposal, made some technical suggestions, but made no comment or objection as to the form of warranty.

The letter of intent set forth above refers generally to the Westinghouse proposal. There is no reference to any differences intended between the warranty on the back of the purchase order form and of any other warranty intended to be obtained by Rust. Later, when the formal purchase order was sent to Westinghouse, a conditional acceptance was stamped on the purchase order and returned to Rust, the acknowldgment form on the Southwest purchase order not being signed. This recurred with respect to each Southwest purchase order that was submitted. Although there was testimony that Rust generally does not consider that it has a contract until it receives back its own signed acknowledgment form and that Rust always tries to get its own form of acknowledgment signed, in this purchase of $1,137,000 these details apparently were not sufficiently important to delay the transaction.

All purchasing departments involved were familiar with the Westinghouse order and acknowledgment forms. Further, the references to pages 4B and 5B of the original Westinghouse proposal containing the Westinghouse form of warranty by Rust when it changed its purchase orders to provide for erection services and installation of the turbine generator unit in a separate contract is significant as indicating the intentions and expectations of the parties. Other correspondence and testimony before the Court shows that as late as September, 1962, the parties had in mind the Westinghouse warranty with its one-year term, rather than the much broader Southwest warranty of indefinite duration.

tract in effect and its terms and conditions[19] and particularly as to the express warranty involved.

The limitation of liability provisions in the Westinghouse proposal and form of acknowledgment are sufficient, under Uniform Commercial Code Sec. 2-719, to limit its liability so as to exclude consequential damages based on breach of contract; there is no evidence before the Court that Westinghouse failed to perform its obligations under its warranty. Westinghouse engineers repeatedly visited the Snowflake mill in response to Southwest's requests in relation to the turbine generator unit. Limitations of liability under Pennsylvania law are valid and enforceable. The parties to an agreement may contract as to limitation of liability resulting from breach of both express and implied

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19. This objective test is consistent with the Uniform Commercial Code, which recognizes that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract," sec. 2-204(1), that an acceptance may be made "in any manner and by any medium reasonable in the circumstances," sec. 2-206(1)(A), and that "a definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms," sec. 2-207(1).

The Rust letter of intent was just such a "definite and seasonable expression of acceptance." The letter was a general acceptance, requiring action by Westinghouse in furtherance of the contract, and not expressly made conditional on assent to additional or different terms. Under the Code, therefore, there was a contract between the parties at the time of the Rust letter of intent.

The effect of the July 6, 1960, Southwest purchase order is determined by sec. 2-207(2), and comments (2) and (3) thereto. The additional terms are to be construed as proposals for additions to the contract. The additional terms here, paragraphs (2) and (12) of the Southwest purchase order, never became a part of the contract because: (1) The original Westinghouse offer expressly limited acceptance to its terms; (2) the proposed additional warranty constituted a material alteration to the prior agreement; and (3) the proposed terms were uncontrovertedly rejected by the Westinghouse stamp affixed to the face of the purchase order form that referred to a form of acknowledgment that Rust had previously received, confirming the warranty contained in the formal proposal and its covering letter, as to which there never was any objection.

warranties.[20] There have been no allegations of unconscionability, and there was no personal injury; this trubine generator unit can hardly be considered "consumer goods", within the meaning of section 2-719. Although liability for consequential damages resulting from negligence was not expressly limited in the Westinghouse form of warranty, the provision limiting liability so as to exclude consequential damages is sufficiently broad also to limit liability resulting from negligence and, in particular, to limit liability to replacements required as the result of faulty workmanship.[21] Under these facts there also can be no recovery for consequential damages based upon a theory of negligence, apart from a contractual duty.[22] Any remedy for breach of the duty of repair

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20. See, *e.g., Eimco Corporation v. Joseph Lomardi & Sons,* 193 Pa. Super. 1, 162 A.2d 263 (1960); *Bechtold v. Murray Ohio Mfg. Co.,* 321 Pa. 423, 184 A. 49 (1936); *Magar v. Lifetime, Inc.,* 187 Pa. Super. 143, 144 A.2d 747 (1958); *Shafer v. Reo Motors, Inc.,* 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd,* 205 F.2d 685 (3rd Cir. 1953). *See generally National Steel Corp. v. L. G. Wasson Coal Mining Corp.,* 338 F.2d 565 (7th Cir. 1964); *American Can Company v. Horlamus Corp.,* 341 F.2d 730 (5th Cir. 1965); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.,* 201 F. Supp. 191 (N.D. Ohio 1961); 3 Bender's U.C.C. Serv. sec. 7.03[3], at 7-48 (1966).

21. See, *e.g., Shafer v. Reo Motors,* 205 F.2d 685 (3rd Cir. 1953); *Charles Lachman Co. v. Hercules Powder Co.,* 79 F. Supp. 206 (E.D. Pa. 1948); *Cannon v. Bresch,* 307 Pa. 31, 160 A. 595 (1932); *Atherton v. Clearview Coal Co.,* 267 Pa. 425, 110 A. 298 (1920); *Wright v. Sterling Land Co.,* 157 Pa. Super. 625, 43 A.2d 614 (1945); *Siegel Co. v. Philadelphia Record Co.,* 348 Pa. 245, 35 A.2d 408 (1944); *Mayo v. McCloskey & Co.,* 200 F. Supp. 7 (E.D. Pa. 1961). *See generally Fire Association of Philadelphia v. Allis Chalmers Mfg. Co.,* 129 F. Supp. 335 (N.D. Iowa 1955).

22. See, *e.g., Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Byrd v. English,* 117 Ga. 191, 43 S.E. 419 (1903); *Stevenson v. East Ohio Gas Co.,* 47 Ohio L. Abs. 586, 73 N.E.2d 200 (1946); *Ultramares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931); *Polo v. Adelbran Brewery,* 185 Misc. 775, 60 N.Y.S. 2d 346 (App. Term 1946); *City of Oxford v. Spears,* 228 Miss. 433, 87 So.2d 914 (1956); *see generally* Restatement (Second), Torts sec. 388 et seq.; 1 Harper & James, *Torts,* sec. 6.10, at 509-10 (1956); *compare Southern Pac. R. Co. v. Gonzales,* 48 Ariz. 260, 61 P.2d 377 (1936). For a discussion of the application of such authorities in the determination of Arizona law, see generally Ulrich, *Federal Diversity Jurisdiction—The Problem of Ascertaining Applicable State Law in the Absence of State Authorities,* Arizona Weekly Gazette, p. 3, col. 1, May 9, 1967.

under the warranty was similarly limited to repair and replacement of defective materials and workmanship for a period of one year.

To summarize, the Court is of the opinion that: (1) the documents constituting the contract between Westinghouse and Southwest with respect to the sale of the turbine generator unit were the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse form of acknowledgment; (2) the effect of these documents and of the conduct of the parties with respect thereto is to include the Westinghouse form of warranty and limitation of liability as a part of the agreements of the parties; (3) the terms of the Westinghouse form of warranty and limitation of liability under Pennsylvania law are sufficient to limit Westinghouse liability so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation, and repair of the turbine generator unit; (4) the damages claimed to have been suffered by the plaintiff in this case are consequential damages within the meaning of the Westinghouse form of warranty and Uniform Commercial Code Sec. 2-719; (5) on the facts of this case, there can be no recovery based upon a theory of strict liability in tort; and (6) there is no separate tort duty, apart from a duty based on contract, to compensate the plaintiff for the consequential losses that it claims to have suffered.

For these reasons, therefore, there being by agreement of counsel no genuine issue as to any material fact, the Court has entered its order granting defendant's motions for partial summary judgment.

Dated this 7th day of September, 1967.

/s/ WM. P. COPPLE
Wm. P. Copple
United States District Judge.

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

ORDER AND JUDGMENT

(Partial Summary Judgment)

Trial to a jury was commenced in this matter on August 8, 1967. The original complaint was filed December 17, 1963. Issue was joined on plaintiff's amended complaint filed July 24, 1967, together with plaintiff's "Amendment of Complaint—July 29, 1967" filed August 2, 1967, and defendant's "Amended Answer and Counterclaim to Plaintiff's Amended Complaint filed August 7 (sic), 1967." There had been various other amendments and changes made in plaintiff's complaint in the interim. Count One and the Supplemental Complaint set forth in the final pleadings sounds in negligence; Count Two, a "strict liability in tort" theory; and Count Four, a warranty theory; all contain, however, prayers for consequential damages only.

Prior to time of trial, Count Three of the final complaint (antitrust) had been severed for a later and separate trial and a stipulation entered into by the parties and filed which is dispositive of defendant's counterclaim. Prior to trial the Court had granted defendant's Motion for Summary Judgment as to Count Two of the complaint (products liability theory). Count Four of plaintiff's complaint (Amendment of Complaint—July 29, 1967) restated a warranty theory which had previously been withdrawn by plaintiff.

On August 10, 1967, the third day of trial, with the consent of counsel for plaintiff, defendant renewed its motion for partial summary judgment as to all counts except the severed antitrust count. The question raised by the motion being:

> First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?

Counsel for both sides agreed that these were questions of law to be decided by the Court from the trial record to that time together with certain stipulated exhibits and depositions. Counsel also agreed that as to these issues and the agreed record there was no dispute as to any material issue of fact and no additional evidence bearing on these two legal questions available to either party.

The Court, having considered the stipulated evidence and read and heard the memoranda and arguments of counsel in support of and in opposition to defendant's said motion for partial summary judgment, has determined that the applicable warranty upon which the sale of machinery was based and which establishes and limits the liability of the defendant and upon which there had been and was a "meeting of the minds" at all pertinent times, is that referred to in Exhibit C-2 attached to plaintiff's answers to defendant's written interrogatories (filed by plaintiff on August 17, 1964) reading as follows:

> "WARRANTY Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part of parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

The Court has further determined as a matter of law that defendant, by virtue of the limitations in this warranty, is not liable to plaintiff for the claimed consequential damages under any theory set forth in those portions of the final pleadings subject to the motion for partial summary judgment. There was no evidence before the Court that defendant had failed to perform its affirmative warranty duties of correction and replacement.

The Court announced from the bench on August 11, 1967, its decision to grant the motion for partial summary judgment.

Now, Therefore, It Is Ordered that defendant's motion for partial summary judgment as to all portions of plaintiff's complaint other than Count Three (antitrust) be granted. Because defendant's costs incurred to date are not fairly separable as being applicable to these counts alone and not to Count Three, taxation of costs will be made in connection with the ultimate final determination of the case.

The Court hereby expressly determines that there is no just reason for delay and expressly directs the entry of final judgment herein in accordance with the foregoing, notwithstanding the fact that there remain other claims that have not been disposed of by this order and judgment.

On July 21, 1967, plaintiff and defendant filed their Pretrial Statement containing a stipulation (paragraph numbered 5) regarding defendant's counterclaim and providing that ". . . in the event plaintiff does not recover on its complaint, defendant is entitled to judgment on its counterclaim . . ." Until the entire complaint has been adjudicated, the Court does not feel it appropriate to enter final judgment on the counterclaim.

For benefit of counsel, the Court is concurrently filing a detailed opinion upon which this Order and Judgment is based.

Dated this 7th day of September, 1967.

/s/ Wm. P. Copple
Wm. P. Copple
United States District Judge

ARGUMENT OF COUNSEL

In Mr. Flynn's argument to the Court on August 11, 1967, he proposed the following inference from Appellee's Exhibit Y-1:

> And the significance of this is that at the bottom of it, your Honor will find, I believe, 'your order has been entered as our general order number. See reverse side for terms and conditions.' And here again, spelled out in exactly the same language are the same warranty provisions.
> (Appeal Transcript, p. 236)

Mr. Flynn also raised and argued the following inference from Appellee's Exhibit Y-2:

> It's dated March 27, 1962, and indicates its distribution and that certainly as early as March 27, 1962 the significance of terms and conditions contained on the back of that document were well known to Mr. Baker because there is a little tab attached to it dated March 29, 1962, which says 'six photostats each of three pages. Six on back of page 1 (terms and conditions).'
> (Appeal Transcript, p. 237)

With regard to Exhibit 2-A, Mr. Flynn, counsel for Westinghouse, would reach the following inference which could be drawn from this document:

> Number 1: It says absolutely nothing about one year as this matter started off of the ground and this is a total addition as distinguished from any other aspect of the case. Theoretically, under that form Westinghouse Electric Company would be liable on the item forever. There is no one year limitation and so it is completely different in a total addition and this appears on each one of the revision documents.
>
> Again, if the court please, each is stamped and returned unsigned. There does appear on the first one the notation, 'Will ship week of July 10, 1960, J. J. Rice, 8-9-60.' I think this is thoroughly explained in Mr. Rice's deposition that because this delivery date was an open end matter and had to be scheduled and confirmed back through the shop, that he waited until this was done. When it was, he inserted that as the date and stamped the documents, 'subject to the Westinghouse Electric Corporation form acknowledgement.'

He also explained the reason that it was not attached, but because on June 13th it had already gone to Rust Engineering Company, and that he returned this document to Mr. Fristchi, I believe his name was, at Rust Engineering Company.
(Appeal Transcript, pp. 238-239)

With regard to the testimony of Mr. Steenhill, in his deposition, Mr. Flynn argued the following inferences were to be derived therefrom:

In August or September, according to Mr. Steenhill's deposition, he received a telephone call from Mr. Baker which there was a request to extend the Westinghouse warranty, and I think this is of substantial significance, if the court please, and the deposition indicates that the reason for the extension was predicated on the fact that the annual tear down had to be extended for a period of time, and because of this they were asking to extend the warranty. Now the only warranty to be extended would be the one-year warranty, and if your Honor please, I think that it was quite clear from Mr. Steenhill's deposition the exhibit that you have before you which is the letter from Mr.—that was attached to his deposition, which was in response to some correspondence from Mr. Steenhill to Mr. Boes of Westinghouse indicating that the repair and replacement portion of the warranty would be extended, but no blanket extension of the warranty could be made.

I submit, if your Honor please, that this is confirmation that in everybody's mind as of that date there simply was no question that the Westinghouse warranty, one-year warranty requested by Rust and proposed by Westinghouse and accepted by Rust Engineering Company on behalf of South-West Forest Industries, was in full force and effect.
(Appeal Transcript, pp. 240-241)

Again, Mr. Flynn raised the following inferences with regard to Appellee's Exhibit Y-2:

Now, if your Honor please, it seems crystal clear that throughout the period and at the time when the difficulties arose in April of 1962, the documents obviously were gathered together and analyzed and there simply was no

> question as of that time in anybody's mind, including the plaintiff in this case, that it was the Westinghouse warranty that applied in the case and as late as—we find, August of the same year, several months later, Mr. Baker asked Mr. Steenhill to ask Westinghouse to extend that warranty.
> (Appeal Transcript, p. 242)

With regard to the letter of intent from Southwest to Westinghouse, dated June 6, 1960 (Ex. EEE), Mr. Flynn argued the following inferences:

> Now, the June 6th, 1960 order has to be the letter of intent. There's no other document in this record, and it is ordered to the proposal submitted by Westinghouse on May 18, 1960, and it appears to me that it's crystal clear by the very allegation and the state of the pleadings which are part of the record in this case, June 6th, 1960, is the date that they accepted the offer extended by Westinghouse.
> (Appeal Transcript, p. 244)

With regard to the knowledge of Mr. Ruyak, Mr. Flynn would advance the following inference from his deposition:

> And certainly Mr. Ruyak knew what the significance of an order acknowledgement form is and certainly he knew what the significance of the stamp on the front of its was; and he certainly knew what the significance of a purchase order that was unsigned was. (Appeal Transcript, p. 248)

Mr. Flynn would also raise the following inferences from Ex. EEE and the Appellant's pleadings:

> At that time we called to your Honor's attention Section 2-204 of the Uniform Code applicable in Pennsylvania, and we argued at that time, and I think our memorandum supports that, that the letter of intent and as now plead in their own pleadings, all tied together was the contract between the parties at that time and the acceptance and at that point there was certainly no misunderstanding or variance or disagreement of any kind between the parties to this transaction, Westinghouse and Rust acting on behalf of Southwest Forest Industries.
> (Appeal Transcript, pp. 248-249)

Again, Mr. Flynn advanced from Ex. EEE an inference that a contract existed as of that date:

> I would submit, if the court please, that and without conceding for an instant that the documents in this case clearly show that a contract existed between these parties as is alleged even in the plaintiff's own pleading by the letter of intent of June 6. (Appeal Transcript, p. 252)

Mr. Flynn also advanced the following inferences from the one-year extension requested by Southwest:

> Consequently, I submit, if your Honor please, that in the commercial world there was no question as to what the warranty was between these parties, and I don't believe there was even any question in Mr. Baker's mind as to what the warranty was in this case. I think they have known all the time what the warranty was in this case. I think when they called and asked to extend the one-year Westinghouse, this proves what they knew they had in mind when Mr. Steenhill made the calls. I think when they drafted their pleadings, including their amendments, and as they stand before the court today, they knew then and they know now exactly what the warranty in this case was and a pleading drafted stating that they placed an order on June 6 can only relate to the letter of intent which was submitted because of the May 18, 1960 proposal and the order acknowledgement of June 13, 1960. (Appeal Transcript, p. 253)

Mr. Flynn, in the following excerpts from the transcript, states that the historic facts (the Exhibits) raised the following inferences:

> Each document in the sequence in this matter has been produced, and I submit that they are the exact documents that we urge were the facts in this case, the facts submitted to your Honor are the exact facts that I argued on Monday as being the facts that controlled this case and which were disputed by Mr. Perry on the basis that there is nothing in the record to support an acknowledgement form, nothing in the record to support this, and so forth.
>
> I think that even Mr. Perry at that time was unaware that in fact there was maintained in the Southwest Forest

> Industries office such a file, that set forth all of these documents. Clearly Mr. Baker got them together and took them to Mr. Fennemore as far back as 1962 at or about the time this matter occurred.
> (Appeal Transcript, pp. 254-55)

Counsel for Southwest, Mr. Perry and Mr. Sutter, have also argued the various inferences that were raised from the historic facts and documents before the Court.

With regard to Exhibit CCC, the Appellant's counsel argued that an entirely different inference arose from the inference that the defendant's counsel, Mr. Flynn, would imply. Mr. Sutter states:

> However, I would like to go back briefly to his reference to Exhibit CCC, which was the—particularly the second page of the Rust invitation to bid and paragraph 13 thereof which Mr. Flynn would imply is identical or virtually identical with the limitations of liability contained in the Westinghouse proposal. That is not true because in paragraph 13 there is no language whatsoever that limits liability or excludes consequential damages whereas the Westinghouse proposal seeks to go further. The two are not identical in that respect, and it cannot be said that Westinghouse in its proposal was accepting a proposal made by Rust as far as the limitation of liability was concerned. (Appeal Transcript, p. 261)

With regard to the letter of intent, dated June 6, 1960, (Ex. EEE) Appellant's counsel raised an entirely different inference than that which was raised by the Appellee's counsel:

> Now, I'd like to look specifically at the letter of intent which was sent out by Rust Engineering on June 6, 1960. That letter opens by saying, 'It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible to issue a formal order to cover the purchase of one 25,000 kw generator unit generally in accordance with your above referenced proposal.' It then goes on and refers specifically to the establishment of a delivery date, but that is the only specific item to which reference is made. An acceptance generally in accordance with your above proposal does not mean that negotiations are ended or that the terms and conditions of the contract have been agreed upon.

Mr. Flynn made the statement that upon sending out the letter of intent, Mr. Ruyak of Rust Engineering expected Westinghouse to start manufacturing on the strength of the letter of intent, but look at what Mr. Ruyak said in his deposition in that regard at page 16. He was asked the question: 'Is the letter of intent the acceptance of the vendor's proposal?'

His answer was: 'I would say not necessarily simply because a letter of intent is so preliminary to actually getting down into the finite language of the contract, I don't think you can interpret the letter of intent as actually part of a proposal or acceptance of a proposal.'

Question: 'What happens, Mr. Ruyak, if the vendor complies with the terms of the letter of intent and starts his date of delivery on drawings?'

Answer: 'Well, we hope that the vendor will commence doing the preliminary engineering work in the spirit of the letter. We hope the vendor will commence to do the engineering work in the spirit of the letter, but there is also the question that he might not accept our terms and conditions, too, when he receives our formal order, so this is something that may have to be worked out later on.'

So clearly when Mr. Ruyak sent out the letter of intent or it was sent out by Rust, there was no intention on the part of those people that a contract was then being created and Mr. Ruyak says, 'In all cases there are further negotiations to be carried out.' The terms and conditions must be agreed upon and they did not expect Westinghouse to start manufacture of the unit. They hoped that perhaps they would start on the preliminary engineering work on the basis of the letter of intent. Whether Westinghouse did or did not was a matter of policy for them to decide upon.

Now, in the deposition of Mr. Rice, he indicates that the letter of intent would not be considered as an acceptance of the Westinghouse proposal, but that a formal purchase order would be subsequently following and it would be that on which they relied.

(Appeal Transcript, pp. 263-265)

Also, the inferences raised by Mr. Sherman's testimony as contained in his deposition are entirely conflicting as contended by the parties, and as stated by Mr. Sutter:

So all that it does according to Mr. Sherman when the letter of intent comes in is to enter an order on the division. I assume he means the manufacturing division to confirm that space.

In other words, they use the letter of intent to call the manufacturing division and say, 'We expect to have an order for a 25,000 kw turbine generator unit coming in. Please reserve or set aside space in your manufacturing schedule for that purpose.' That is all that I can see that they do as far as the letter of intent is concerned.

This is brought out even more at page 11 of Mr. Sherman's deposition where he was asked a question: 'Did you know that sometime after your form of general order was prepared that Westinghouse Electric Corporation received a formal purchase order from Southwest Forest Industries for the turbine generator?'

Answer: 'I would know that that happened.'

Question: 'Do you have a recollection that in fact it did happen?'

Answer: 'Yes, because this is the way a salesman gets his credit, when the treasury and order department say we really have an order from the customer at this stage of the game, and that's when the purchase order comes in when we say we really have an order from the customer at this stage of the game. *Prior to that, everything is considered to be in negotiation or primary stages and it's negotiation when the purchase order is received that Westinghouse considers that they do have an order.*'

(Appeal Transcript, pp. 267-268) (Emphasis added)

Mr. Sutter also stated that the only inference that can be derived from the letter of intent (Ex. EEE) is:

Under the facts in the case and the depositions of the people who were principally involved in the formation of this contract, I cannot see how the letter of intent and the Westinghouse proposal can be said to form the contract involved in this litigation. There was something left to be done and it was more than a mere formalizing of the contract because the subsequent events indicate that there were substantial changes made in the proposal and in the ultimate contract, principally in the warranty provision, but

also in other matters dealing with price and other terms and conditions in the contract.

On July 6th, Rust Engineering sent to Westinghouse the formal purchase order which is marked Plaintiff's Exhibit 12 in this case. That was stamped with the Westinghouse stamp form of acknowledgement and it was held until August 10th by Mr. Rice who according to his deposition said that he held it for that length of time in order to be able to give the customer a firm delivery date.

Now, there is one very important element of the contract that had not been settled at that time. It was highly significant or highly important to Southwest Forest Industries that they have a firm delivery date for this piece of equipment that would fit into the construction schedule of the mill. It would be vain and futile for them to spend $20,000,000, $25,000,000 or more constructing a mill at Snowflake, Arizona, and have all of the other equipment sitting there for a year or two, or even a matter of only three or four or six months waiting for a turbine generator to arrive. So delivery of this piece of equipment which might be said to be the heart of the mill since it supplied the electricity on which the mill was to operate was an important item, that delivery date was extremely important. So there was a very material element of the contract that was not fixed and not determined until Mr. Rice returned the purchase order with the delivery date on it.

(Appeal Transcript, pp. 268-270)

Also, the parties are in dispute as to the conflicting inferences that may be drawn from the testimony of Mr. Rice and Mr. Ruyak, as Mr. Sutter stated:

> Mr. Rice admits in his deposition that they were not attached to the purchase order when it was returned. Mr. Ruyak not once, but repeatedly in his deposition said he didn't know what forms of acknowledgement Westinghouse might have been referring to. He had no knowledge of what those terms and conditions might be. . . .
>
> Mr. Ruyak was positive and explicit in his statement not once, but many times on questioning by Mr. Flynn, that he did not know what the terms and conditions of the Westinghouse forms of acknowledgement were. Now Mr. Ruyak is the only one who testified on this point. I would say at

> least a half a dozen times in his deposition he testified to that effect, so these items or this form of acknowledgement which was not disclosed, and they may have assumed that it had been disclosed or that somebody at Rust knew something about it, but there's no evidence in the record to that effect, being undisclosed, it could not become part of the contract.
>
> It is therefore our position that the acceptance by Westinghouse by placing the rubber stamp on the purchase order and by having Mr. Rice's signature appear on that purchase order is sufficient to form the contract and that that is the contract between the parties. (Appeal Transcript, pp. 272-273)

The various inferences drawn from the historic facts, and documents by the Appellant and Appellee are in direct controversy and conflict as stated by Mr. Sutter:

> We submit that under all the documentary evidence, the depositions of the witnesses and the other evidence in this case, that the contract before the court in this case is that form by the purchase order and its acceptance by Westinghouse and that the warranties and dates are those specified on that purchase order. (Appeal Transcript, p. 274)

SUMMARY OF DEPOSITIONS

In the deposition of Paul Kelly, an employee of Westinghouse he states that he went to Snowflake, Arizona, on December 12, 1961, when the No. 2 extraction valve had closed suddenly (Deposition, p. 7) because the orifice was blocked with metal chips (Deposition, pp. 10-12). Mr. Kelly again returned to Snowflake on January 27, 1962, because of the poor operation of the No. 2 extraction regulator. (Deposition, p. 22). He then dismantled the regulators and found that they had slight scoring on both pistons and cylinders, which was caused by hard foreign matter (Deposition, p. 25). He then found foreign matter, or chips, in the oil reservoir, which was located on the ground floor of the power house, and the oil from the oil reservoir was pumped from the reservoir up into the turbine generator unit (Deposition, p. 27). Mr. Kelly does not recall doing anything about the scoring on the pistons and cylinder walls of the No. 2 regulator, and the only thing he did in an attempt to find out what had caused the scoring, was to keep his eye open when he opened the regulators for any foreign matter (Deposition, pp. 33-34). On March 22, 1961, Mr. Kelly again returned to the Appellant's plant, and found that the turbine unit was only operating fairly, in that the No. 2 extraction was not holding the pressure quite as well as he would have liked to have seen it. (Deposition, pp. 35-36) On March 27, 1961, he took the regulator apart and found additional scoring had taken place on the power piston and cylinders and that the orifice feeding the B2 cup valve was partially plugged with mill scale. (Deposition, p. 40) Also, upon finding the mill scale, he drained the oil reservoir for the first time. (Deposition, pp. 41-42).

Mr. Kelly states the oil from the oil reservoir was pumped up from the reservoir into the turbine to lubricate the bearings and other portions of the turbine, and that between the reservoir and the extraction controls there were no filters on the oil lines at this time, as they were installed later (Deposition, p. 45). Mr. Kelly states that in January of 1962 he removed the pistons and found scoring on the pistons and cylinders and that on March 27th, he

again removed the pistons and found scoring, and that the scoring was of a greater magnitude in March than it had been in January, and that he had found the same problem again in the same orifice where he had encountered the difficulty in December. (Deposition, pp. 48-50).

Mr. Kelly goes on to state in his deposition that there was improper machining on the compensator bushing, which is something that could have occurred at the factory, and that on April 1, 1962, he also found interference between the compensator rods and the cup seat valve in the compensator. He states there was not enough tolerance between the moving parts to permit free movement, and that they hit and rubbed when they were not supposed to. He also states this is something that could have occurred at the factory. On April 1, 1962, Mr. Kelly also found a small amount of mill scale and a gelatinous substance in the compensator, which was very similar to the foreign material which he had previously found in the orifice on the extraction regulator, and in response to the following question, "You made no effort to determine its source?", Mr. Kelly answered, "Well we didn't dismantle the entire piping system." (Deposition, pp. 67-69).

Mr. Kelly then continued by saying that the power piston cylinder showed definite scoring and some scratches were apparent on the pistons again, and that there was more damage done to the pistons and cylinders on this occasion than he had seen on his visit in January and February (Deposition, pp. 70-72).

Mr. Kelly goes on to state that as far as he was personally concerned, he felt the cleaning up of the pistons and cylinders, which was on April 1, 1962, was all that was indicated at the time as being required. However, he does state that on April 2, 1962, the 60-pound extraction Servo motor started to oscillate because the piston rod, which is a vertically moving piston rod, began moving up and down and that this was not normal under the circumstances. He states that they then took the Servo motor apart and found what appeared to be several small pieces of mill scale in the pilot relay mechanism. The mill scale which he found was similar to that which he found in the oil reservoir and in the orifice on the regulator

extractor unit No. 2. (Deposition, pp. 77-79). Mr. Kelly stated at this time he did not attempt to determine the source of the mill scale, although he did look at a few pipes they had off between the regulator and the Servo motor (Deposition, pp. 78-79). On April 9, 1962, Mr. Kelly states that the mill was shut down so that repairs to the regulator block could be made. These repairs were done at Karlson Machine Works in Phoenix, Arizona, where the regulator block was bored out and sleeved, and bushings put in and new pistons installed. Also, the No. 2 extraction Servo motor was disassembled, inspected, and reassembled and some of the pipe was disassembled and pickled with acid for the purpose of removing any foreign material that might be inside the pipe. Mr. Kelly says the pickling was done at the recommendation of Mr. Baker of Southwest Forest Industries. Mr. Kelly also states that at this time a filter was installed in the high pressure oil line, immediately upstream of the regulator so that the oil would be passing through the filter just prior to entering the regulator block. (Deposition, pp. 90-94(a)). Mr. Kelly then states that on approximately April 16, 1962, the steam turbine generator went back on the line and operated satisfactorily. (Deposition, pp. 96-97).

The deposition of Mr. Ralph Willard LeGates, an engineer for Westinghouse, shows that he arrived at the Snowflake plant on March 31, 1962, and that Mr. Kelly advised him that the extraction regulators were not operating right, that he could not get them set, and that they were just in general difficulties. Mr. LeGates stated he had been informed by Mr. Kelly that he had worked for some time attempting to set the extraction regulators and had been unsuccessful. (Deposition, p. 38). Mr. LeGates states that they checked the unit over, reset the control, and tried to put it back on the line, but they were not successful in getting what he considered good operation from the unit, as the extraction controls were the principal trouble. He also states they found the compensator bushing had been improperly machined as it had tool marks in it where it should have had a smooth surface, and that this undoubtedly occurred at the factory (Deposition, pp. 41-42).

In the Deposition of Mr. Henry A. Parzick, an engineer for Westinghouse, he states that around Christmastime he was informed that problems had developed with the extraction regulator. He states the 60-pound regulator was oscillating and that the only thing they could attribute this condition to after an examination of it, was, of course, the foreign matter in the regulator, itself. He was present when the foreign matter was discovered in the regulator (Deposition, pp. 9-11).

In the Deposition of Mr. Raymond E. Baker, an employee of Southwest, he states that on December 28, 1961, they experienced further difficulty in the operation of the steam turbine generator. It went back on the line at 2:45 p.m. on December 29, 1961, and on the next day the extraction control still was not functioning properly, with one of the extraction valve motors locked in one position. He states that on January 3, 1962, after several attempts, it was shown that the 60-pound extraction control still would not operate properly, and on January 8, 1962, the other extraction control went out of order, and on January 9, 1962, springs were replaced on the extraction operating motors and various other adjustments were made. During this period of time, more foreign material was found in the hydraulic system. (Deposition, pp. 36-37). Mr. Baker then states that the operation was reasonably satisfactory between January 9, 1962, and January 22, 1962, until there was a mill shut-down because of power failure in the well field and during the process of shutdown, a ruptured disc on a 60-pound steam line ruptured, apparently because the 60-pound extraction control valve did not operate quickly enough. On start-up the second one failed and the machine was shut down again, repairs made to the piping, and the ruptured disc replaced. On start-up, both extraction controls hung-up very badly and would not control, so they contacted the Westinghouse people (Deposition, p. 40). Mr. Baker goes on to state that at this time, they were relying primarily upon Westinghouse to make whatever corrections were necessary to get the unit functioning (Deposition, p. 42). On January 24, 1962, after repairs to the piping and the ruptured disc, the unit was put back into operation;

however, during that day there was sufficient load on the mill to put the extraction stages into operation and it became apparent they would not work at that time, and Southwest then tried to operate in a curtailed manner and make arrangements to redo the job and redo the repairs. The mill was again shut down in the early morning hours of January 29, 1962, and it was found that the power piston cylinder wall had been scored on the 60-pound extraction control (Deposition, p. 45). On January 30, 1962, the unit went back on the line, with some variation in the steam pressure in the 235-pound line and the Southwest people felt that it was still not functioning properly. However, Westinghouse maintained it was satisfactory. It continued to operate in that manner with some variation in pressure until the early morning of March 20, 1968, when the 235-pound control started sticking again, and there was another shut-down at 8:00 a.m. on the morning of the 21st day of March, 1962. Upon examination, it was found that both of the pistons and cylinder walls had been scored again. They were polished and then on the start-up the controls functioned improperly on both the 60-pound and the 235-pound mechanisms. The mill was again shut down on the morning of March 27, 1962. Again, the cylinder walls were scored and there was an additional delay in waiting for a new oil filter that was to be installed in the system, and the mill was finally re-started on March 29, 1962. On start-up, it was impossible to get the 235-pound extraction into operation, so they had to operate the groundwood plant at a reduced load and by the 31st of March, 1962, the 60-pound was also out of control and would not operate. On April 1, 1962, the plant was again shut down and on April 2, 1962, it was back on the line at 7:35 a.m., but it was impossible to get the 235-pound extraction working and the other one was fluctuating in pressure. Mr. Baker was advised by Mr. Eikner, General Manager of Westinghouse Large Turbine Division in Philadelphia, that because of the scoring that had taken place, and then the increase in clearance due to the polishing of the original score marks, they were continuing to get binding that was causing the continuing score marks and continuing binding.

Mr. Baker was advised it would be impossible to get satisfactory operation because of the original scoring and polishing out.

On the morning of April 8, 1962, the mill again began a shutdown, and at this time the block and pistons were taken to Phoenix, Arizona, and Hanson Machine Company bored out a cylinder to a larger diameter to accommodate the sleeves that were being furnished by Westinghouse. (Deposition, pp. 48-50).

Q. All right. On that date did you personally observe a defect in the equipment?
A. Yes. I saw leakage around the seals at the top of the power pistons and I saw that the springs were not functioning properly.
Q. And at that time did you have a conversation with Mr. Adams and Mr. Canavan?
A. At that time, yes, some.
Q. And where did that conversation take place?
A. In the turbine room.
Q. And who was present?
A. Mr. Adams and Mr. Canavan.
Q. All right. Will you recite or relate to the jury that conversation as you remember it?
A. Well, as I recall, we talked about the difficulties at that time that they had with the spring at the Servo motor operating the extraction valve and at the oil seals at the top of the power pistons in the extraction regulator or block. They had previously dismantled it and had replaced these seals and they were still leaking.
Q. Did they tell you why?
A. No, they didn't tell me why at that time.
Q. Is that the extent of the conversation you remember at this time?
A. So far as I recall.
(Appeal Transcript, pp. 132-133)

Q. What did you see?
A. Well, they had obtained in the meantime a new spring to install into the extraction Servo motor. We made arrangements to shut the mill down by the next morning at which time they replaced the spring.
(Appeal Transcript, p. 133)

Q. Now, sir, on that occasion did you have a conversation at the turbine room about the malfunction of the unit?
A. Yes, sir, I did.
Q. And who was present?
A. Mr. Pozek and Mr. Kelly.
Q. Tell us that conversation, please.
A. After they had told me that they had found scoring in

the cylinder wall and pistons of the 60-pound extraction governor of the control mechanism, we talked about the desirability of taking apart the 235-pound piston, the corresponding system, regulating the 235-pound regulator's valve.

Apparently they had previously not decided to do that. We did take it apart. Scoring was found in the cylinder wall of that mechanism as well as on the piston, and there was some small particles of iron filings present.

Q. Will you tell the jury whether in a proper hydraulic system iron filings are to be found in the hydraulic system?

(Appeal Transcript, pp. 134-135)

Q. BY MR. PERRY. Answer it, please.

A. You cannot tolerate the presence of iron filings in a hydraulic system operating mechanisms that were depending upon as close clearances as there are in this without doing extreme damage and causing malfunctions in the unit.

Q. And will you explain to the jury why that is so?

A. Because the parts have to be free to move without friction. The clearances are very small. The presence of a small iron filing which is very sharp on its edges would get caught in these clearances and by the movement of the piston would cause scoring and then cause friction or binding and when the piston was not free to move, the control system could not operate.

(Appeal Transcript, p. 138)

Q. Is a properly functioning exciter essential to the operation of a turbine generator?

A. Absolutely.

Q. Do you have any direct personal knowledge of trouble which was experienced with the exciter at Snow Flake during July, 1964?

A. I do.

Q. What problems were experienced during July, 1964 with the exciter?

A. The first occurrence was the darkening or . . . . of one bar and burning of one bar of the armature of the exciter, and that evidenced itself by arcing between the brushes and the commutator.

(Appeal Transcript, pp. 139-140)

A. After discovering the severe arcings that was taking place and the burning of one bar in particular, we knew that we

had to shut down because first of all we tried polishing to remove the effects of the arcing that had taken place, polishing the bars, started up again and it reoccurred very quickly. We called for help. First of all, we talked to the technical people at Sterns-Rogers consulting—

Q. Excuse me, Mr. Baker. You should not relate any conversations you had with people other than with Westinghouse people, but you can tell physically what was discovered to be wrong with the unit if you know from your personal knowledge.

A. Well, we did not get help from Westinghouse on this job, we got help from—

Q. Well, did you send the unit somewhere for repair?

A. Yes, sir. After we had a General Electric service manager there to look at it, he told us that it would have to go to a shop to be repaired; and we sent it to Phoenix to General Electric Repair Shop.

(Appeal Transcript, p. 142)

Q. All right. What was that defect which was discovered?

A. There was a loose connection between the riser from the bar, commutator bar, and the field coil lead. It had been soldered only in two very short hairline spots rather than the full contact faces being soldered and that had parted breaking the contact between the commutator bar and the field coil lead.

Q. All right, sir. Was that repaired?

A. That was repaired.

Q. And was the unit returned to Snowflake and put back in operation?

A. Yes, sir.

Q. How long was your mill down during that period of repair?

A. As I remember, it was about 36 hours.

Q. And after the unit was placed back in service following that repair, how long did it continue to operate without difficulty?

A. It barely went on the line until trouble started again.

(Appeal Transcript, pp. 143-144)

Q. All right. What was the trouble this time?

A. Two additional bars were burning badly and there was more severe arcing.

Q. Do you know of your own personal knowledge what was discovered when the unit was inspected in Phoenix on this second occasion?

A. Yes, sir.

Q. What was it?

A. Two additional bars had—the connections between the riser from the bars and the field coil leads had separated.

Q. Will you describe the welding as it was done, the silver soldering, rather?

A. It was very similar to the first one, to—or very small portion or hairline contacts of the bar with the riser with the field coil lead by solder, the full face of contact, there was no soldering surface.

(Appeal Transcript, pp. 144-145)

No. 22696

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC., a corporation,

Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,

Appellee.

On Appeal from the District Court, District of Arizona

Brief of Appellee

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STATEMENT OF THE CASE

I. Introduction.

Southwest sued Westinghouse for consequential damages allegedly incurred by it as a result of defects in a 25,000 kilowatt turbine generator unit sold by Westinghouse to Southwest. The dollar amount of the claim was large.* Both parties are substantial corporations. Southwest was represented in the lawsuit from its institution in 1963 through its trial in 1967 by a battery of experienced lawyers from a large Phoenix law firm. Few cases have been more exhaustively prepared and presented. Through its trial counsel,

*The original claim as expressed in the complaint was $11,000,000. It has been refined downward to approximately $2,500,000 by the time of trial.

Southwest selected the legal theories upon which it wished to rely. As the size of the record attests, exhaustive discovery proceedings based on those theories were had. After full factual and legal development on Southwest's original theories, it became evident to Southwest's trial counsel that those theories would probably not suffice to produce the recovery Southwest desired. They therefore, with considerable ingenuity, persuaded the trial court to allow Southwest to abandon its original theories and to adopt a new and more promising one. That necessitated a continuance of the trial and additional discovery. Following that, trial was had. The case was tried on Southwest's new theory. Westinghouse won. Following final judgment, Southwest changed attorneys and theories.

Westinghouse cannot and does not accept either the statement of the issues or the statement of the case as presented by Southwest. In part the theories now asserted on appeal are a reversion to earlier theories abandoned by Southwest before trial and not litigated below. In the main the theories are wholly new and were never suggested until after trial. In many instances, the positions taken by Southwest on this appeal bear little resemblance to the case presented below and many are contrary to express stipulations and concessions of Southwest below. For all of these reasons, it will be necessary for Westinghouse to develop in this brief, in some detail, the true procedural and substantive posture of the case as it was presented below. Because we will have to do so point by point with respect to the seven "Questions Presented" by Southwest, we wish first to make the following preliminary observations which will be developed in greater detail later:

1. (Relative to Southwest's Questions Presented I and II). Except with respect to the theory of strict liability in tort, this is not a summary judgment case at all. The critical issues in the case, as presented to the trial court under the

theory selected by Southwest, were submitted to the court for final determination one way or the other pursuant to an express stipulation of the parties that the issues were issues of law, that the issues should be decided by the court, that the facts were undisputed, and that neither side had any additional evidence of any type bearing on those issues.

2. (Relative to Southwest's Question Presented III). At no time prior to final judgment did Southwest put in issue the alleged unconscionability of the Westinghouse exclusion of consequential damages, a theory that was immaterial under Southwest's primary theory of the case at trial.

3. (Relative to Southwest's Question Presented IV). At no time below did Southwest contend that Westinghouse was liable for negligent manufacture or repair on a pure tort theory independent on any duty created by the contract between the parties.

4. (Relative to Southwest's Question Presented V). Southwest conceded throughout and in fact stipulated that the damages it was claiming were legally termed "consequential." At no time prior to final judgment did Southwest assert its theory that some of its damages were legally termed "incidental."

5. (Relative to Southwest's Question Presented VI). The question of whether the trial court committed error in granting summary judgment on Southwest's theory of strict liability in tort is properly here for review and decision.

6. (Relative to Southwest's Question Presented VII). At no time below did Southwest contend that the exclusion of consequential damages contained in the Westinghouse warranty was ineffective because it failed to comply with the Uniform Commercial Code requirements for the disclaimer of all warranties.

II. Background of the Case and Development of the Litigation from 1963 Until Southwest Changed Its Theory on August 2, 1967.

Between 1955 and 1959 Southwest, through independent consulting experts, conducted studies to determine the feasibility of building and operating a pulp and paper mill on land owned by it in Arizona (A.T. 94).* Upon completing these studies, Southwest determined to proceed with the project and entered into an engineering and construction contract with Rust Engineering Company (hereafter "Rust"), a large engineering firm headquartered in Pittsburgh (Ex. 1, App. 2-11). Under this turnkey contract, Rust was to design and construct the entire mill, and had full responsibility for purchasing all necessary materials, machinery and equipment for it. The Southwest-Rust contract specifically required Rust to obtain for Southwest appropriate warranties from manufacturers of the equipment to be purchased (Ex. 1, Art. I, para. C-10, App., p. 4). For performing its services, Rust was to receive a fixed fee of $1,500,000 plus 25% of any savings realized if it succeeded in building the mill for less than the guaranteed maximum price to Southwest of $32,334,500.

Rust proceeded to design the mill. It determined what equipment was necessary for the entire mill and prepared specifications for such equipment. One piece of equipment determined to be necessary was a 25,000 kilowatt turbine

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*References to "A.T." are to the Appeal Transcript which is in two volumes consecutively paginated and which covers proceedings of August 8, 9, 10 and 11, 1967. Seven separate volumes of Reporter's Transcript are part of the record, cover pretrial and post-trial matters, and are individually paginated. They will be referred to by the abbreviation "T." and the date of the volume, *e.g.*, T. Aug. 1, p. 10. References to exhibits will be by exhibit number and, where appropriate, by parallel citations to the appellant's appendix where the exhibit is reproduced. Reference to that appendix will be "App." References to the reproduced record, consisting of three volumes, consecutively paginated, will be to "R."

generator. Having determined the specifications it desired for it, Rust sent to Westinghouse an invitation to bid on the unit.* In response to that invitation, Westinghouse, on May 18, 1960, submitted a formal proposal on the unit. Rust and Southwest decided to purchase the unit from Westinghouse. After Westinghouse received the order, it built the unit in Pittsburgh and Philadelphia during the balance of 1960 and the first half of 1961. It was shipped to Arizona during the summer of 1961 and installed by Rust by October, 1961. The pulp and paper mill began operation in November, 1961.

Southwest claimed that it had trouble with the unit during the early stages of the mill's operation. It sued Westinghouse on December 17, 1963 alleging that the turbine generator unit was defective. Southwest's original complaint alleged two legal theories: negligence and breach of warranty. Relatively early in the case, Westinghouse propounded interrogatories to Southwest seeking its "understanding of any warranty extended by Westinghouse concerning the purchase and sale of the steam turbine" (R. 25). In the face of Southwest's objection that the interrogatories were "too vague and indefinite" and called for "legal conclusions" (R. 29), the trial court amended the interrogatory so that Southwest could respond by supplying "a copy of the document or documents which plaintiff considers to contain the terms of the warranty in question." (R. 46). Southwest then submitted two documents. One was the turbine generator specifications prepared by Rust on April 14, 1960 and submitted by Rust to Westinghouse as part of its invitation to bid of May 3, 1960 (R. 139-141). The other document submitted by Southwest was

*Rust submitted a similar invitation to at least one other manufacturer of turbine generators, General Electric (A.T. 154).

the Westinghouse proposal of May 18, 1960 (R. 143-146), which contains what is now known in this case as the "Westinghouse warranty." It states:

> "WARRANTY—Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

These answers to interrogatories were sworn to by a senior executive of Southwest, Raymond E. Baker, Executive Vice President in charge of Southwest's Paper Products Group and the man with overall responsibility for the mill at all times (R. 80).

These answers were filed on August 17, 1964. From then until August 1, 1967, the scheduled trial date, the parties proceeded on the basis of Southwest's response. Westinghouse did not know, of course, precisely how Southwest would present its contention that the governing warranty was in the Rust specifications and the Westinghouse proposal, but since Westinghouse's position was that its warranty in its proposal of May 18, 1960 governed the case, the parties were at least in agreement as to what documents were important.

All discovery proceedings, which were very extensive, proceeded on the basis that the documents containing the governing warranty were not in dispute. Therefore, discovery was directed toward other matters, such as the nature, extent and method of computation of Southwest's damages, the design, construction, installation, repair and

operation not only of the turbine generator unit but of the entire mill and innumerable other matters relating to design and operational difficulties of the mill during the start-up period.

In 1966, Southwest added a count to its complaint alleging that a portion of the unit known as an "exciter" had malfunctioned in July, 1964, more than two and a half years after its installation (R. 639-40). Consequential damages of $150,000 were claimed. Also in 1966, Southwest amended its complaint to add a count to "take advantage of the newly recognized doctrine of 'strict liability in tort.'" (R. 648). It was established by interrogatory that Southwest claimed the same defects and the same items of damage with respect to this theory as it did with respect to its original theories of breach of warranty and negligence (R. 677).

After discovery was substantially completed, Westinghouse filed two separate motions for partial summary judgment. One contended that the strict liability in tort theory did not apply to the case so as to enable Southwest to recover its claimed economic consequential damages (R. 700-719). The second motion was directed to Southwest's warranty theory, the contention of the motion being that the warranty in the Westinghouse proposal of May 18, 1960, by its express terms barred recovery of consequential damages (R. 720-32). Pretrial conference was set for July 24, 1967. A few days before that, counsel for the parties met pursuant to court order to exchange lists of witnesses and exhibits and to prepare a joint pretrial statement. In that statement, Southwest, in the face of the pending motion on the warranty count and in apparent recognition that the Westinghouse warranty did in fact bar consequential damages, voluntarily abandoned its war-

ranty count and elected to rely upon its theories of negligence and strict liability in tort (R. 751-53). A "clean draft" complaint alleging only those two theories was submitted at the pretrial conference by Southwest (R. 777).

At the pretrial the court granted Westinghouse's motion for partial summary judgment directed to Southwest's theory of strict liability in tort (R. 981). This left Southwest's negligence claim on both the basic unit and the exciter which the court set for trial for August 1. Since Southwest had voluntarily dropped its warranty count, it requested and was granted leave to amend its answers to interrogatories concerning damages and Westinghouse was granted leave to redepose Southwest's principal damage witness after the pretrial. (R. 786). That witness, the Comptroller of Southwest, was redeposed on July 25. On July 26 Southwest filed its amended answers to interrogatories on damages, reducing its claim to approximately $2,500,000 (R. 789).

Following completion of this additional discovery relating to damages, Westinghouse filed a motion for summary judgment directed to Southwest's sole remaining theory—negligence. This motion asserted that, under Pennsylvania law, the exclusion of consequential damages contained in the Westinghouse warranty barred recovery on Southwest's negligence theory. Late in the day the day before the case was set for trial, Southwest filed and served a motion to amend its complaint to reallege the warranty theory previously withdrawn by it (R. 848) and the proposed amended complaint itself (R. 880-81). Southwest simultaneously dropped the bombshell around which most future proceedings revolved. It filed an "Amended Answer to Interrogatory Nos. 28 and 29," (relating to the warranty documents) asserting for the first time that the "warranty

extended by Westinghouse in its sale of the steam turbine is contained in the purchase order for the said unit issued by Southwest Forest Industries, Inc. and accepted by Westinghouse" (R. 850). If the governing warranty was in fact contained in the Southwest purchase order, a whole new lawsuit was about to begin because its terms were:

> "The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder." (Ex. 2-A, App. p. 27).

Since these developments occurred at 4:45 p.m. the night before the scheduled trial, counsel met with the court in the morning. The jury was excused and counsel, on August 1 and 2, presented arguments on Southwest's motion to reallege its warranty count and to amend its interrogatories to insert a wholly new warranty document into the case, which warranty was unlimited in type of damage recoverable and unlimited even in point of time. Westinghouse vigorously opposed the motions, pointing out that Southwest itself years earlier had selected the documents upon which it relied as containing the governing warranty, that all discovery had proceeded on that basis, and that Southwest had itself voluntarily abandoned its warranty count in the face of a motion for summary judgment directed to it. Westinghouse argued that the motion was untimely, would broaden the issues in the case and would require additional discovery.

Southwest argued in support of its motion that putting the warranty count back in really added nothing to the case, since Southwest would have to prove a contract under its negligence count anyway to create any duty running from Westinghouse to Southwest (T. Aug. 1, p. 3, 4), that the Southwest purchase order of July 6, 1960, was in fact the contract which existed between the parties rather than the Westinghouse proposal of May 18, 1960 (*Id.*, p. 5) and that under the terms of its purchase order Southwest was entitled to recover consequential damages (*Id.*, p. 6). Counsel for Southwest argued that Southwest should not be penalized if its counsel had misunderstood which contract existed between the parties.* (T. Aug. 2, p. 15-16).

Southwest also argued that the amendment would not change the character of the damages being sought, stating: "They obviously are consequential and have been all along" and "the damages claimed are those damages which the courts characterize as consequential damages." (T. Aug. 1, p. 21-22). Southwest's counsel, obviously recognizing that Southwest could not recover under its negligence theory if the Westinghouse warranty applied argued that "for this case to be terminated at this point because of a mistake in the answer to interrogatory would not be performing justice." (*Id.*, p. 23). Southwest's counsel expressly stated for the record that Southwest would rely on a contract to create a duty running from Westinghouse to Southwest (*Id.*, p. 28).

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*This argument was made even though the answers to interrogatories which stated that Southwest relied upon the Westinghouse warranty were verified in 1964 by Raymond E. Baker, Executive Vice President of Southwest in charge of the Paper Products Group who, at that time, swore that the answers to interrogatories were prepared under his supervision, that he had read the exhibits attached to them (which included the Westinghouse warranty marked with an "X") (R. 144), and that the answers were true and correct to the best of his knowledge, information and belief (R. 80).

The trial court was deeply troubled by the motions. It recognized that Southwest was now asserting a contractual basis for its claim entirely different from the "agreements of parties and everything from the very beginning" (T. Aug. 2, p. 17) making the case "a substantially different lawsuit" (*Id.*, p. 18). But the trial court finally determined to grant the motion (*Id.*, p. 20). The deciding factor was the court's belief that a litigant should not be penalized for counsel's error (*Id.*, p. 19). Had the court then known what everyone later learned, *i.e.*, that Southwest's own executives had always considered the applicable warranty to be the Westinghouse warranty and had in fact submitted the Westinghouse warranty to former counsel for an opinion when the matter first came up (a fact unknown to Southwest's trial counsel until Westinghouse discovered such proof in Southwest's records during trial), it undoubtedly would have denied the motion and the litigation would have been terminated at that point.

Since Southwest's new theory made additional discovery necessary, the court continued the trial for several days to allow the parties to take more depositions in Pittsburgh and Phoenix. The parties then set about to establish, through discovery, all of the facts relative to Southwest's new theory. The gathering of all those facts was not completed until the second day of the trial itself, a fact which is important in understanding the procedural posture of this case.

III. Developments Between Southwest's Change of Theory on August 2 and the Commencement of Trial on August 8.

The depositions in Pittsburgh and Phoenix the next few days concentrated on attempting to develop all the testimony and to trace all the documents relevant to the now critical question: was the Westinghouse warranty of May 18, 1960,

the contract of the parties or was the warranty on the Southwest purchase order of July 6, 1960, the contract of the parties? The facts developed as follows:

Chronologically the first document in the chain was the Rust invitation to bid which was sent by Rust to Westinghouse on May 3, 1960. Rust, of course, had agreed to obtain for Southwest appropriate warranties on all equipment purchased for the mill. Amazingly, this first document is not even mentioned in Southwest's opening brief. While it is not itself one of the contract documents, it is highly relevant in establishing Rust's expectations and the usual warranties provided in the industry. It contained the following provision, which had been specially prepared by Rust for use with all its invitations to bid on the entire Southwest project (Ruyak Depo., p. 58).

> "13. GUARANTEE: Supplier shall be required to guarantee the performance of his equipment and the material furnished to the extent that he shall replace, f.o.b. jobsite, without additional cost to the owner, any unsuited to the purpose intended during the first year of use of same in active service, upon notice by the engineers or owner." (Ex. CCC, p. 2, para. 13).

It was in response to this invitation that Westinghouse, on May 18, 1960, submitted its formal proposal (Ex. DDD, App. 12-16). It has been quoted above and, as noted, provides for repair or replacement of defective parts for a one-year period and excludes consequential damages.

The proposal included provision for a Westinghouse engineer to provide technical advice when the unit was installed. The warranty for that service was spelled out in the proposal and also excluded liability for consequential damages (Ex. DDD, p. 5B).

On June 6, 1960, Rust sent to Westinghouse a letter of intent. It read:

"SUBJECT: SOUTHWEST FOREST INDUSTRIES, INC.
25,000 KW TURBINE-GENERATOR
WESTINGHOUSE REFERENCE #60203

"Gentlemen:

"It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit, generally in accordance with your above referenced proposal.

"However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand had been established for approximately 13½ months." (Ex. EEE, App. 17).

Upon receipt of this letter of intent, Westinghouse prepared its General Order, which was assigned number 88081. This is the document used by Westinghouse formally to write up and to acknowledge an order from a customer. Several copies are made on a preprinted set. One of these copies is called a "25" and is the customer's acknowledgment copy (Ex. Y-1, App. 18-21). It advises the customer that the order has been entered under a particular number, requests the customer to use that number in all future communications relating to the order, and, most importantly for purposes of this case, restates the Westinghouse warranty in the precise terms as that which were included in the Westinghouse proposal of May 18, 1960 (Ex. Y-1, App. 19). Westinghouse personnel in Pittsburgh testified that Copy 25 was sent by Westinghouse to Rust when the General Order was prepared (Depo. of Suto, pp. 12-13, Depo. of Rice, pp. 18-19).

Westinghouse naturally desired to establish that Copy 25 had in fact been received by Rust. This attempt failed in Pittsburgh when two Rust executives testified that Rust's

entire purchasing file relating to the turbine generator unit had recently disappeared and could not be located (Steenhill Depo., p. 11; Ruyak Depo., pp. 8-9).

The next document that was exchanged between Rust and Westinghouse was the Southwest purchase order of July 6, 1960, which is the document Southwest contended formed the contract between the parties (Ex. 2-A, App. 26-29). It was prepared by Rust and signed by a Mr. Staley, who had earlier been appointed Southwest's purchasing agent by written document executed by Southwest (Ex. KKK, App. 22-23). The purchase order states that the unit shall be "in accordance with The Rust Engineering Company's specification EQ-6 [which accompanied the Rust invitation to bid of May 3, 1960] and Westinghouse Electric Corporation's proposal dated May 18, 1960." It also states: "Confirming 'Letter of Intent' dated June 6, 1960 to Mr. J. J. Sherman—*DO NOT DUPLICATE.*" (Ex. KKK, App. 25). On the reverse side of the purchase order is printed the "Southwest warranty." It has previously been quoted. Basically it is an open-ended indemnification clause without limitation in time or type of damage.

At the bottom of the purchase order there is contained a space for the vendor to sign under the legend:

> "ACKNOWLEDGMENT"
>
> "The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein." (Ex. 2-A, App. 26).

The Southwest purchase order was received by Westinghouse and was handled by J. J. Rice, a Westinghouse order correspondent. After obtaining verification of a shipping date from the Westinghouse factory, he wrote on the face of the purchase order (not in the space for acknowledgment) "Will ship w/o [week of] 7/10/61, J. J. Rice 8/9/60" (Rice

Depo., p. 20, Ex. 2A, App. 26). He did not sign the acknowledgment. Instead, he stamped on the face of the purchase order the following:

> "Order PG88081*
>
> "In referring to this order please use this number as a reference.
>
> "Order accepted subject to conditions outlined in W. E. Corp. form of acknowledgment." (Ex. 2A, App. 26).

Mr. Rice testified this stamp was placed on the purchase order to do exactly what it says: tell the customer the order is accepted subject to the conditions in the Westinghouse form of acknowledgment (Rice Depo., p. 21). The word "attached" was crossed out by Mr. Rice because the Westinghouse acknowledgment form (Copy 25) had already been sent to Rust on June 13, 1960, when the order had been written up following receipt by Westinghouse of the letter of intent. On four occasions after the purchase order of July 6, 1960, Southwest purchase orders were again issued by Rust and sent to Westinghouse to reflect amendments and revisions of the original order. All of these were handled in precisely the same way as the original purchase order. Each was stamped with the same stamp, the word "attached" was crossed out on each, and each was returned to Rust with the space for acknowledgment left blank (See Ex. 2A, App. 30, 31, 35, 36). In each of the revisions which Rust prepared Rust expressly stated that all the other terms and conditions of the original order remained the same (Ex. 2A, App. 30, 34, 35, 36). In addition, one substitute Southwest purchase order was issued which deleted pages 4-B and 5-B of the Westinghouse proposal (relating to technical services of a Westinghouse engineer). Pages 4-B and 5-B

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*Mr. Rice wrote in the order number, which was not part of the stamp.

became the subject of a separate Rust purchase order (Ex. XXX, App. 37). Page 5-B contained the Westinghouse warranty for services which, like the warranty on the sale of the equipment, also excluded consequential damages.

While the depositions of the two Rust executives in Pittsburgh were not as productive as they might have been if Rust's purchasing file on the turbine generator unit had not disappeared, certain relevant facts were established which became significant later in the trial court's ruling.

Mr. Steenhill, Rust Project Manager for the Southwest job, testified that he was sure that copies of all contract documents were transmitted to Southwest at the time they were being exchanged between Rust and Westinghouse (Steenhill Depo., p. 12). Very significant was the fact that he also testified that he, in 1963, at the specific request of Baker of Southwest, had requested Westinghouse to extend its *one-year warranty* until July 1963 because Southwest was unable to schedule its first annual shutdown until then (Steenhill Depo., p. 13-16). Westinghouse's response to the request was that it would take responsibility for the replacement of parts, if any, found defective on the July, 1963, teardown, if defects were found to be clearly due to design, material or workmanship, but that it could not depart from the usual one-year warranty and accept responsibility for Southwest's mode of operation (Ex. 3 of Steenhill Depo.).

Mr. Ruyak, the Senior Buyer for Rust, was also deposed. He had formerly been employed for seven years by Westinghouse. The majority of his Westinghouse employment was in the purchasing department, where he was responsible for the purchase of all process machinery and equipment for one division of Westinghouse. (Ruyak Depo., p. 4-5). He was fully aware of the normal Westinghouse terms and conditions (Id., pp. 12, 83-84). He testified that the provision

in the Rust invitation to bid calling upon bidders to agree to replace parts for a one-year period was prepared by Rust and was submitted to all prospective bidders, including Westinghouse (Id. p. 84). He prepared the letter of intent of June 6, 1960, the Southwest purchase order of July 6, 1960, and all the later revisions to it. Upon receipt of a proposal from a vendor, it was his responsibility to determine whether there were any variances between the vendor's terms and conditions and those required by the purchaser (Id. p. 40). Specifically, it was part of his job to see to it that the vendor's terms and conditions met the requirements of Rust's contract with Southwest. If there were conflicting terms, he was to refer the matter to Rust's legal department (Id., p. 40). Had there been any variance in this particular case, the normal routine would be to resolve it in conference with the Westinghouse sales engineer and the Rust legal department (Id., p. 77). On no occasion did Rust or Southwest make any inquiry of Westinghouse or express any questions relative to the Westinghouse terms and conditions in this case.

Additionally, Ruyak conceded that, on a number of occasions, he had seen purchase orders returned from Westinghouse with the Westinghouse stamp affixed and the word "attached" crossed out (Id., pp. 78-79). However, since the file on this particular purchase had disappeared, he could not recall whether this had occurred on this particular purchase order. In the absence of his file, he stated that he believed the Southwest purchase orders were returned by Westinghouse directly to Southwest (Id., pp. 41-42), although Westinghouse personnel testified positively that the stamped purchase orders were returned to Rust.

By this point, it was obvious that two documents assumed considerable importance. The first was "Copy 25," the order acknowledgment form, prepared by Westinghouse following

receipt of the Rust letter of intent. This was important because it showed Westinghouse considered the letter of intent as an order and because its return to Rust restated the Westinghouse warranty in the same terms as the Westinghouse proposal of May 18, 1960, to which the Rust letter of intent had responded. The Westinghouse testimony was that Copy 25 had been sent to Rust on June 13, 1960. Rust said its file was lost and it did not know if it had received Copy 25 (Id., p. 17, 24). The other important document was the Southwest purchase order stamped by Westinghouse which a) indicated that the order remained subject to the terms of the Westinghouse warranty as restated in Copy 25 and b) expressly declined to acknowledge or accept any of the other terms or conditions contained in the Southwest purchase order. While Southwest had earlier produced, in connection with its motion to change theories, a stamped copy of the purchase order,* the testimony was ambiguous as to whom the stamped copy was sent. Westinghouse said it was sent to Rust with whom all Westinghouse dealings had been. Rust, again pleading absence of specific knowledge because of the fact the file was missing, claimed it believed the purchase orders were returned by Westinghouse directly to Southwest.

On this point, the parties moved back to Phoenix where Mr. Baker, Executive Vice President of Southwest, was again deposed on August 7. He denied that he maintained any file or record whatsoever relating to purchases for the mill or of any correspondence relative to such purchases (Baker Depo., Aug. 7, p. 5). He testified that the Southwest purchasing department files had originally been maintained by a Mr. McBride who had since retired and whose where-

*Westinghouse had no stamped copy in its possession—the Westinghouse testimony being that the stamped copy was returned to Rust.

abouts were unknown to him. He further testified that the purchasing files which had been maintained by McBride for 1960-61 had been destroyed (Id., p. 5). He denied ever recalling seeing a copy of the Southwest purchase order stamped by Westinghouse, or of any of the revisions thereto, although he acknowledged Revisions #2 and 4 bore his personal "Received" stamp and Revision 3 bore notes in his personal handwriting (Id., pp. 7-8). On this note, the additional pretrial discovery necessitated by Southwest's new theory was concluded.

On August 2, after Southwest had reinstated its warranty count under its new theory, Westinghouse had renewed its earlier motion for summary judgment which had been made moot when Southwest abandoned its first warranty count. The renewed motion was argued on August 7. On that date, Southwest filed, in opposition to the motion, an affidavit of Baker in which he swore that page 2 of the Rust invitation for bids (requesting vendors to include in any proposals a one-year warranty for the replacement of defective parts) "definitely" was not included as part of Rust's invitation to Westinghouse to bid on the turbine generator (R. 959-60).

Southwest then argued in opposition to the motion for summary judgment that there was a dispute between the parties as to what the contract was, that the Baker affidavit created an issue of fact as to whether page 2 was included with the Rust invitation to bid, that the Ruyak deposition indicated that he, Ruyak, did not consider that Rust had a firm deal until a purchase order was returned accepted by the vendor, that Westinghouse in fact had acknowledged, signed and returned the purchase order, that Westinghouse could not modify a proposed contract when it failed to attach the modifying document, that the stamped purchase order went to Southwest and not to Rust, and that the court would

Steenhill of Rust to Baker of Southwest on March 27, 1962, and that copies were distributed to several individuals, including Southwest's attorney at that time. Exhibit Y-2, also produced from the Southwest files, was a Southwest inter-office memorandum from Fates to Baker dated April 9, 1962, reflecting the results of a meeting held between Southwest, its then counsel, and its insurance agent, which refers to the Westinghouse order acknowledgment and quotes the language of the warranty contained therein. It should be noted that these documents are all dated well in advance of Southwest's request to Westinghouse to extend its one-year warranty.

Baker had clearly been severely impeached. His present admissions, compared with his previous testimony, together with the production of the critical documents from Southwest's own file, were highly important. The jury, of course, had heard and observed this impeachment and had observed that the critical documents had now been dragged out of Southwest's own files. Besides this, it now became clear that Southwest's own executives had been responsible for Southwest's long reliance on the Westinghouse warranty, a fact at odds with Southwest's last minute plea to the court that it should not be penalized merely because its trial counsel had been in error in their understanding of the terms of the contract.*

Southwest and its trial counsel had some decisions to make. If Southwest could convince the court as a matter

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*We wish to make clear that we do not impugn the integrity of Southwest's trial counsel in the slightest. There is no hint that Southwest ever advised them of their earlier review of the contract documents and of their submission to prior counsel. There is also no hint that trial counsel knew the Southwest file had not in fact been destroyed, that Baker had in fact kept a personal file or that Southwest's files showed Rust had received Westinghouse's Copy 25 and sent it to Southwest until these facts were disclosed by Westinghouse's search of the files finally produced by the subpoena.

of law that, under the facts as now developed, the terms of the Southwest purchase order became the contract of the parties, it could proceed with its case. If it could not so convince the court, there was no reason to proceed with what promised to be an extremely long, technical and expensive trial. It was at this point in the case that Southwest's counsel requested a bench conference (A.T. 220). This led to an agreement between the parties and the court that the court should, at this point in the case, decide the critical issue of which warranty applied and of its legal effect. It was Southwest's counsel who first used the expression "renewed motion for summary judgment" which present counsel seizes upon. Following the bench conference, Southwest counsel advised the court that Westinghouse counsel had indicated a desire

> "to renew his motion for summary judgment at this time, and on behalf of the plaintiff, I have agreed that it is appropriate that it be done at this time since I believe that the issues he raises are legal ones and that there is sufficient uncontradicted evidence in the record from which a determination of those legal issues can be made." (A.T. 222-23).

Notwithstanding some of Southwest's present contentions, there is no reasonable doubt the positions of the parties had crystalized: Southwest relied principally upon the theory that the terms and conditions of the Southwest purchase order of July 7, 1960 governed the case. Alternatively, Southwest contended that if the Westinghouse warranty governed, its terms should not be held to bar Southwest's claim under Pennsylvania law. Westinghouse, on the other hand, contended that its warranty provisions governed and that its terms under Pennsylvania law excluded consequential damages both on a warranty theory

and on a negligent breach of warranty theory. It was understood by all involved that if the court ruled in favor of Westinghouse on both questions being submitted, the case was over. Southwest did not then urge any independent tort theory, as distinguished from a negligent breach of a duty created by contract. This is made clear by several passages in the record.

Southwest's counsel stated that "there is a dispute which we believe is a legal one about which if any warranty provision is effective to control the contractual relationship between the parties." (A.T. 223). Southwest's counsel suggested that counsel meet and prepare a written statement of "the two issues of law which are to be presented to the court." (A.T. 221). Those questions ultimately were stated by the court in its order and judgment (R. 1009) to be:

> "First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> "Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?"

Counsel for Westinghouse requested that the memoranda filed in connection with the earlier motions for summary judgment be considered by the court in its resolution of the issues now being submitted to it for decision. The parties then very carefully supplemented the record by stipulating into it every additional document and deposition which they wished the court to consider in deciding the two agreed questions (A.T. 224-27).

The court then adjourned until the next day so counsel could prepare their arguments and so the court could review the transcripts, depositions, and exhibits which the parties had stipulated should be considered by the court.

At the beginning of argument the next day the following colloquy occurred:

> "The Court: Before we start, just to make sure that on any review the record is perfectly clear, following the request and discussion with counsel, that's on the record for yesterday afternoon, the defendant has renewed its motion for summary judgment on all portions of the complaint as presently amended and before the court other than the anti-trust count and the plaintiff concurs in this procedure; is that correct?
>
> "Mr. Perry: [lead trial counsel for Southwest] That is correct, your Honor.
>
> "The Court: And the motion before the court is based on the trial record to date, the exhibits and depositions that were heretofore specified in the record by counsel?
>
> "Mr. Perry: That is correct.
>
> "The Court: And the parties agree that there exists no dispute as to any material fact necessary to decide the legal issues of what constitutes the contract warranty and whether the defendant is liable thereunder for the claimed consequential damages; is that correct?
>
> "Mr. Perry: That is correct.
>
> "The Court: The parties agree that the specified exhibits are genuine in that they are what they purport to be and the only question is as to their legal significance in connection with the motion for summary judgment; is that correct?
>
> "Mr. Perry: That is correct.
>
> "The Court: And that neither side has any evidence to present contradicting or impeaching any of the testimony in the specified depositions; is that correct?
>
> "Mr. Perry: That is correct." (A.T. 229-30).

Counsel then argued the case. In light of the stipulation, Southwest of course did not argue that there were ques-

tions of fact requiring jury determination as it now does on appeal. Southwest argued that its warranty applied. Westinghouse argued that its warranty applied. Whichever way the court ruled, the decision would be binding on both parties, since each had stipulated to a resolution of the issues at this stage of the trial and had no more evidence. At the conclusion of the argument and having considered the stipulated record, the court concluded that the minds of the parties had met on the Westinghouse form of warranty and that that warranty barred Southwest's claim for consequential damages under Pennsylvania law. Thereafter, the court entered a formal order and judgment (R. 1008-1010) as well as a detailed opinion, explaining the reasons for its decision (R. 978-1007).

V. Southwest's Change of Attorneys and Change of Theories After the Trial.

The opinion and judgment were filed September 8, 1967. On September 15, Southwest changed attorneys. On September 18, Southwest's new attorneys filed a motion to alter and amend the judgment. In it, Southwest disavowed its earlier stipulation that the question of which warranty applied was one of law and argued that it was one of fact. It also disavowed its stipulation that the facts were undisputed and argued that there was a question of fact. Then, seizing upon the term "renewed motion for summary judgment" and ignoring the plain fact that the issues were submitted for decision by the court one way or the other, Southwest argued that the court had erred in ruling for Westinghouse since the alleged factual disputes barred summary judgment. Additionally, the motion asserted for the first time, contrary to all earlier proceedings and a stipulation of the parties, that Southwest's claimed damages

were not "consequential" after all, but were "incidental" so as not to be barred by the terms of the Westinghouse warranty. The third new argument advanced, which also had never been presented to the trial court, was that the Westinghouse warranty was unconscionable.

The motion to alter and amend was extensively briefed and argued. After a thorough review of the record and all the prior proceedings, the trial court concluded that there was nothing in the stipulated record from which a reasonable person could even draw an inference other than that the Westinghouse warranty applied, and therefore it was immaterial whether the stipulated proceeding was treated as a request for an interlocutory summary adjudication or as a trial to the court with a waiver of a jury finding. (T. Dec. 4, p. 24). The court also noted that Southwest itself had at all times characterized its damages as consequential throughout all proceedings, that the question of unconscionability had not been raised before judgment, and that

> "in the context of this case these facts and these parties, the court could not say that there was a question of unconscionability upon which evidence should be taken particularly in the absence of any offer or claim by counsel to that effect." (T. Dec. 4, p. 26).

The court thereupon denied the motion. This appeal followed.

ARGUMENT

I. Southwest Stipulated That the Issues of Which Warranty Governed and of Its Legal Effect Were Questions of Law to Be Determined by the Court and That There Were No Issues of Fact and Cannot Now Claim That There Were Fact Issues Which Should Have Been Resolved by the Jury.

Southwest's Questions Presented Nos. I and II are interrelated and will be dealt with together. As phrased by Southwest those questions are:

> "I. Can a court properly grant a motion for summary judgment to the moving party, when the moving party on a motion for summary judgment fails to establish that there are no genuine issues as to material facts?"
>
> "II. Was there a meeting of the minds of Southwest and Westinghouse on all of the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance?"

The phrasing of these questions simply ignores everything that occurred in the trial court. If anything in this case is clear it is that the parties, by express stipulation, submitted the following two questions to the court for determination by the court upon an agreed record of testimony, depositions and exhibits:

> "First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> "Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?" (R. 1009).

The court, in deciding these stipulated questions, held that there was a meeting of the minds on the Westinghouse warranty and that the legal effect of the Westinghouse warranty, under Pennsylvania law, barred Southwest's claim for consequential damages. We have set forth at some length the procedural history of this case because, we submit, it demolishes Southwest's argument that this is a summary judgment case. It is quite true that there were references to a "renewal" of a motion for summary judgment, but such an understandable misnomer should not now entitle Southwest to repudiate its stipulations and ignore the record of what actually occurred. Since the issue had once been briefed and argued in the form of a motion for

summary judgment, and since the parties requested the court to consider the same memoranda that had been filed in connection with the motion, it is not surprising that the term "renewal of a motion for summary judgment" was used. What is surprising is that Southwest could now dispute the plain fact that both parties put in all the evidence they had on the critical issue and specifically requested the court to decide the issue one way or the other. It was a perfectly sensible thing to do. The trial had reached a point where all available evidence on the question was in or could easily be put in by stipulation. This was done. A lengthy trial was fruitless and expensive if the court was going to accept Westinghouse's arguments.

The position of the parties was clear. Southwest claimed its warranty applied. Westinghouse claimed its warranty applied. Had the court held that the Southwest warranty applied, Westinghouse would have been bound by the ruling for the rest of the trial since it, like Southwest, had stipulated it had no more evidence on the issue. Even after the court had ruled and Westinghouse submitted a proposed form of judgment Southwest did not, in its objections to the judgment, contend that the procedure was improper or that there was an issue of fact requiring jury determination (R. 976).

The court and the parties would hardly take time out in the middle of a trial to excuse the jury, enter into elaborate stipulations, and supplement the record with exhibits and depositions if the only purpose was to re-urge a motion for summary judgment which had once been denied. Had Southwest felt at the time that the question was one of fact for the jury, the whole proceeding could not possibly have occurred. Southwest would simply have proceeded with the presentation of its case and Westinghouse would have been powerless to raise the issue until plaintiff had rested.

This case is strikingly similar to *Gillespie v. Norris,* 231 F. 2d 881 (9th Cir. 1956). There both parties moved for summary judgment. At the hearing on the motions, evidentiary matters were submitted and considered by the court. The parties acquiesced in this procedure. Each side argued its respective position and neither side claimed that there were issues of fact. The court entered judgment for one party, calling it a "summary judgment" because of the manner in which it had first been presented to the court. On appeal, the losing party did exactly what Southwest is doing in this case. It retreated from its original position that its view should have prevailed and argued instead that there was an issue of fact which precluded summary judgment for the other side. This Court held that the claim came too late. The parties had acquiesced in a procedure which was in actuality a trial to the court. Here Southwest not merely acquiesced in the procedure, it suggested it to the court and *stipulated* to it.

The First Circuit was presented with a similar situation in *Demelle v. ICC*, 219 F. 2d 619 (1st Cir. 1955), *cert. denied* 350 U.S. 824, 76 S. Ct. 52, 100 L.Ed. 736 (1955). That case turned upon an interpretation of an ICC certificate. Each party had his own view of the proper interpretation. Plaintiff moved for summary judgment. Defendant stipulated there was no issue of fact but urged that his interpretation of the certificate be accepted by the court. The trial court accepted plaintiff's interpretation and granted plaintiff's motion for summary judgment. On appeal, defendant, like Southwest here, retreated from the stipulation and asserted that there was an issue of fact which barred summary judgment for the plaintiff. The court held that, having stipulated below that no fact issue existed, the defendant could not contend on appeal that fact issues did exist.

In *Tripp v. May,* 189 F. 2d 198 (7th Cir. 1951), defendant moved for summary judgment. At the hearing, plaintiff orally moved for summary judgment. Defendant stated there were no factual disputes and that he had no further evidence to offer. The trial court granted judgment to plaintiff. On appeal, the Seventh Circuit affirmed, although it agreed with the defendant's belated assertion that issues of fact existed. It affirmed because all the facts were in evidence before the court and the fair inference of the record was that the parties had submitted the issue to the court for determination. In the instant case, the court does not need to search the record to determine whether there was any acquiescence or implied waiver by conduct. The record in this case is clear. There was an express stipulation that the issues were submitted to the court for decision by the court. Under the rationale of *Gillespie, Demelle,* and *Tripp, supra,* Southwest cannot now claim that issues of fact exist.

Additionally, Westinghouse wishes to point out that the cases relied upon by Southwest in support of its argument have no relevance to this case. Much of Southwest's argument is based on the proposition that agreements of counsel on questions of *law* are not necessarily binding on the court (see, *e.g.,* Appellant's Brief, pp. 17, 25). Here Westinghouse and Southwest did not purport to bind the court by agreements on questions of law. They agreed on the *facts.* The issues of law were properly submitted to the court for its determination. Nor did the stipulation as to the facts operate to create a moot or fictitious case, such as was condemned in *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281, 37 S. Ct. 287, 61 L. Ed. 722 (1917), relied upon by appellant. Appellant's other cases, *Cram v. Sun Ins. Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967) and *Brawner v. Pearl Assurance Co.,* 267 F.2d 45 (9th Cir. 1958) simply stand for

the well known proposition that a party, by making a motion for summary judgment, does not impliedly concede that no fact issue is present if his legal theory is rejected. Those cases have nothing to do with the situation in which a party stipulates that no fact issue exists.

When Southwest, in its second Question Presented, poses the question of whether there was a meeting of the minds of the parties, it completely fails to take into account the express holding of the trial court that there was a meeting of the minds. The first stipulated question presented to the court was:

> "What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?" (R. 1009).

Obviously to decide that issue, it is essential to determine what warranty the minds of the parties met on and the court did so. It expressly held:

> "that the applicable warranty upon which the sale of machinery was based and which establishes and limits the liability of the defendant and upon which there *had been and was a 'meeting of the minds' at all pertinent times,* is that referred to in Exhibit C-2 (the Westinghouse form of warranty) attached to plaintiff's answers to defendant's written interrogatories . . ." (Emphasis added.) (R. 1010).

Southwest's argument on the "meeting of the minds" issue as it appears in Appellant's Brief pp. 26-35 is not too clear to Westinghouse. Southwest first states that the factual question presented is whether the minds of the parties met on the terms and conditions of the Westinghouse proposal or of the Southwest purchase order (Brief, p. 29). Next, it is stated that it is "apparent" that the minds of the parties did not meet on either one, so the Uniform Com-

mercial Code should fill the void (Id., 29-30). It is next stated that the Westinghouse exclusion of consequential damages was not brought to the attention of Rust or Southwest and therefore did not become part of the contract (Id., 30-31). Finally, it is stated that if there was a meeting of the minds at one point, the agreement was later modified by adding to it the terms and conditions of the Southwest purchase order (Id., 32-35) under applicable provisions of the Uniform Commercial Code. Southwest then engages in a partial tracing of the chain of documents without mentioning the one that started it all in the first place—the Rust invitation to bid of May 3, 1960.

Southwest nowhere contends that the ruling of the trial court is unsupported by the stipulated evidence before the court or that, if the question is one of fact as now contended by Southwest, the finding is clearly erroneous. It is entirely based upon the unwarranted assertion that this is a summary judgment case. Under these circumstances, we believe all of Southwest's various positions on this aspect of the case can best be answered by quoting from the thorough opinion of the District Court. The court carefully spelled out its reasons for holding that the minds of the parties met on the terms and conditions of the Westinghouse warranty:

> "At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgment form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's 'Amendment of Complaint—July 29, 1967', cannot reasonably be explained on any other basis. By every objective test there was an agreement as to the

nature of the contract in effect and its terms and conditions and particularly as to the express warranty involved." (R. 982).

. . . .

"Other facts before the Court show that Rust was requested by Southwest in August or September, 1962, to extend the Westinghouse warranty. Rust and Westinghouse exchanged correspondence, the effect of which was that the replacement portion of the warranty would be extended, but that no blanket extension of the warranty could be made. A Southwest memorandum dated April 9, 1962, refers to documents that Southwest's attorney would like to have in preparing an insurance claim for the damages suffered at the mill. This memorandum refers specifically to the form of warranty contained in the Westinghouse order acknowledgment form that had by that time been received by Southwest.

"To the court these facts also show at these late dates that Southwest clearly confirmed their understanding that it was the Westinghouse form of warranty, limited in time and obligation, that was applicable to the sale." (R. 995).

The court's opinion also dispels Southwest's present contention that the Westinghouse warranty was not brought to the attention of Rust or Southwest, even though that issue was not raised below:

"There were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse.

"The Rust letter of invitation appended a form of warranty specifically tailored for the Southwest contract. The form of warranty was, setting aside for the moment the consequential damage limitation, substantially the same as the Westinghouse warranty. When the Westinghouse proposal was received, a copy of it

was sent to Southwest. Southwest commented upon the proposal, made some technical suggestions, but made no comment or objection as to the form of warranty.

"The letter of intent set forth above refers generally to the Westinghouse proposal." (R. 1001).

. . . .

"All purchasing departments involved were familiar with the Westinghouse order and acknowledgment forms. Further, the reference to pages 4B and 5B of the original Westinghouse proposal containing the Westinghouse form of warranty by Rust when it changed its purchase orders to provide for erection services and installation of the turbine generator unit in a separate contract is significant as indicating the intentions and expectations of the parties. Other correspondence and testimony before the Court shows that as late as September, 1962, the parties had in mind the Westinghouse warranty with its one-year term, rather than the much broader Southwest warranty of indefinite duration." (R. 1002).

The trial court has also completely answered Southwest's present assertion that, assuming an original meeting of the minds, the contract was later modified by adding to it the terms on the back of the Southwest purchase order:

"Under the Code, therefore, there was a contract between the parties at the time of the Rust letter of intent.

"The effect of the July 6, 1960, Southwest purchase order is determined by section 2-207(2), and comments (2) and (3) thereto. The additional terms are to be construed as proposals for additions to the contract. The additional terms here, paragraphs (2) and (12) of the Southwest purchase order, never became a part of the contract because: (1) the original Westinghouse offer expressly limited acceptance to its terms; (2) the proposed additional warranty constituted a material alteration to the prior agreement; and (3) the

> proposed terms were uncontrovertedly rejected by the Westinghouse stamp affixed to the face of the purchase order form that referred to a form of acknowledgment that Rust had previously received, confirming the warranty contained in the formal proposal and its covering letter, as to which there never was any objection." (R. 1003-04).

Westinghouse believes now, as both Westinghouse and Southwest believed at the time of trial, that, under Pennsylvania law, the question of what the contract was is one of law for the court to determine when the facts are undisputed. See *Reitmyer v. Coxe Bros. & Co.*, 264 Pa. 372, 107 A. 739 (1919); *Buff v. Fetterolf*, 207 Pa. Super. 92, 215 A.2d 327 (1965); *In re Home Protection Building & Loan Assn.*, 143 Pa. Super. 96, 17 A.2d 755 (1941). Southwest does not now challenge that proposition of law but, instead, seeks to remove its predicate by saying that the facts are disputed. Having stipulated they were undisputed, Southwest cannot now raise the issue on appeal and the ruling of the court should be affirmed. But even if the question were one of fact under Pennsylvania law, Southwest has shown no grounds for reversal.

By stipulation of the parties, the question of which warranty governed was unquestionably submitted to the court for decision. Southwest makes no suggestion that what it now contends to be a factual finding by the court is unsupported by the stipulated evidence nor does it contend that it is "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure. The trial court has rendered a thoughtful and detailed opinion fully explaining the reasons for its finding. Findings by a trial court are not reversible unless so "clearly erroneous" that the reviewing court is left with a "definite and firm conviction that a mis-

take has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). Southwest, as appellant, bears a heavy burden to show that such findings are clearly erroneous. *Pacific Queen Fisheries v. Symes,* 307 F.2d 700 (9th Cir. 1962). See also *Bowser, Inc. v. Filters, Inc.,* 398 F.2d 7 (9th Cir. 1968); *Clostermann v. Gates Rubber Co.,* 394 F.2d 794 (9th Cir. 1968); and *Home Indem. Co. v. Allstate Ins. Co.,* 393 F.2d 593 (9th Cir. 1968).

Southwest doesn't even attempt to show that the finding, which it contends to be factual in nature, is clearly erroneous. But even if this case were treated as a summary judgment case in the classic sense, which it most definitely is not, Southwest has failed to show grounds for reversal. It simply asserts that conflicting inferences exist. In support of its assertion, it simply points to the arguments of counsel which are nothing more than arguments concerning what legal result should follow given the undisputed stipulated facts. Southwest makes no real attempt to show that any conflicting inference it claims to exist could reasonably lead to any conclusion other than the one the District Court reached. No challenge to the following statement of the trial court, which was made when denying the post-trial motion to alter and amend, has been made:

> ". . . I cannot see that there could even be an inference [that the Southwest form of warranty controlled or was in the minds of the parties]. I mean even an inference has to be based upon something, and clearly from any objective tests as to what the subjective meeting of the minds was, it clearly shows that at all times from the invitation to bid until the day before the trial of the lawsuit years later, that it was clearly in the minds of Southwest that the Westinghouse form of warranty controlled." (T. Dec. 4, p. 26).

Westinghouse believes the foregoing unchallenged statement of the trial court is the best answer to Southwest's present argument, even accepting Southwest's unwarranted assertion that this case is a summary judgment case at all.

II. Southwest's Present Theory That the Westinghouse Warranty Was Unconscionable Presents No Reversible Error.

A. The Theory of Unconscionability Was Never Presented or Litigated Below and Should Not Be Considered on Appeal.

Southwest's third Question Presented relates to the alleged unconscionability of the Westinghouse exclusion of consequential damages. This theory was inserted into the case by Southwest after it had changed counsel following final judgment. It is wholly untimely. Under Southwest's principal theory, *i.e.,* that the Southwest warranty contained in the July 6, 1960 purchase order governed the case, it was wholly immaterial whether the Westinghouse warranty was abstractly unconscionable or not. Under its theory, the exclusion of consequential damages was not part of the agreement of the parties. Even in urging Southwest's alternative theory, *i.e.,* that even if the Westinghouse warranty governed, Pennsylvania law did not bar consequential damages, Southwest never contended that the exclusion was unconscionable. Southwest itself relied upon the Westinghouse warranty from the time it filed its suit in 1963 until August 2, 1967, without once mentioning that a portion of it was alleged to be unconscionable.

Southwest well knows that its present theory of unconscionability is untimely and goes to considerable effort (Appellant's Brief, pp. 36-38) to show that *Westinghouse* mentioned unconscionability below. Westinghouse's counsel did mention it, but only in pointing out that Sec. 2-719 of the Uniform Commercial Code expressly allowed such exclusions for commercial losses, whereas in cases involving

consumer goods such exclusions were *prima facie* unconscionable where personal injuries were involved. This argument certainly did not inject the issue of unconscionability into the case. There is no other reference in the record to unconscionability until after final judgment.* One thing is clear: in no pleading ever filed by Southwest was unconscionability alleged, even when Southwest relied upon the Westinghouse warranty. Only after Southwest changed attorneys and theories after final judgment was the issue of unconscionability injected. The District Court, in denying the motion to alter and amend, expressly noted that:

> "No offer was ever made to make any record supporting it, and I think in the context of this case these facts and these parties, the court could not say that there was a question of unconscionability upon which evidence should be taken particularly in the absence of any offer or claim by counsel to that effect." (T. Dec. 4, p. 26).

Everyone is entitled to his day in court. But at some point litigation must be terminated. Both parties to this lawsuit are substantial corporations and had the means to develop fully their respective theories. Each did so. Even after exhaustive discovery on the original theories selected by Southwest, the court allowed Southwest, on the day set for trial, to amend its theory and to start over. Southwest did this in the face of a motion for summary judgment and in obvious recognition of the fact that it was in serious trouble on its original theories. It saw a possible way out—to shift

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*On p. 36 of Appellant's Brief, a paragraph is quoted from a memorandum Southwest says it filed on August 11, 1967. The reference is to p. 1022 of the record. That page is a page of Southwest's motion to alter and amend filed September 18, 1967, and does not contain the quoted material. The record reflects no memorandum filed by Southwest on August 11 and Westinghouse has unsuccessfully searched the record before the District Court to find the quoted material.

to the theory that the Southwest purchase order of July 6, 1960 constituted the contract between the parties. Even though it was late in the proceedings, the trial court allowed the amendment believing that a litigant is entitled to put his best foot forward. Southwest did so. It lost. Now it wants to advance a new theory in the hope that it might prove more successful.

Courts everywhere recognize that a party is not entitled to litigate interminably on one theory after another. The sensible and well established rule is that a party may not raise on appeal issues and theories which he did not present or litigate below. This Court has applied this rule in a variety of cases.* The same consideration applies and the same rule governs when the new theory or issue, while asserted before appeal, comes only after judgment in the court below.† Indeed, even when the shift of theories comes before judgment in the trial court but after the case has been presented on another theory, it comes too late. See, *e.g.*, *Albrecht v. Herald Co.*, 367 F.2d 517 (8th Cir. 1966), *rev'd on other grounds*, 396 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968). The application of this universal rule of appellate practice prevents piecemeal litigation, tends to put an end to litigation and requires the parties to deal fairly and frankly with each other and with the trial court. See *Apex Smelting Co. v. Burns*, 175 F.2d 978, 982 (7th Cir.

**Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), *Roberson v. United States*, 382 F.2d 714 (9th Cir. 1967), *Pacific Queen Fisheries v. Symes*, 307 F.2d 700 (9th Cir. 1962), *Inman-Poulson Lumber Co. v. Commissioner of Int. Revenue*, 219 F.2d 159 (9th Cir. 1955), *United States v. Waechter*, 195 F.2d 963 (9th Cir. 1952), and *Wilson v. Byron Jackson Co.*, 93 F.2d 572 (9th Cir. 1937).

†*Cleary v. Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir. 1960) and *Royal Indem. Co. v. Olmstead*, 193 F.2d 451 (9th Cir. 1951); *3 Barron & Holtzoff/Wright, Federal Practice and Procedure*, § 1304 (1958); 6A *J. Moore, Federal Practice*, ¶ 59.07 (Rev. ed. 1966).

1949). For these reasons, this Court should not consider or decide the issue of unconscionability.

B. Even Assuming Southwest's Theory of Unconscionability Were Properly Here for Consideration, Southwest Has Shown No Reason for Reversal on That Theory.

Southwest phrases its question on this point as follows:

> "When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, is such an exculpatory clause unconscionable under the *Uniform Commercial Code?*" (Appellant's Brief, p. 14, 36).

It is immediately apparent that this question contains factual assumptions which contradict the record. It assumes the Westinghouse warranty is in fact unconscionable, that it was not brought to the attention of Southwest, that it somehow deprived Southwest of the benefit of its bargain, and then poses the question of whether the clause is unconscionable under the Uniform Commercial Code. A mere reading of those portions of the court's opinion quoted above completely dispels the erroneous statement that the warranty was not brought to the attention of Southwest and also shows that Southwest got exactly what it bargained for. Calling something unconscionable doesn't make it unconscionable. Had Southwest alleged unconscionability, the provisions of Sec. 2-302(2) of the Uniform Commercial Code would have been brought into play. That section provides:

> "(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Southwest never requested a hearing on unconscionability, *even after trial.*

Southwest seems to be arguing that the Westinghouse warranty is unconscionable as a matter of law under the Uniform Commercial Code. It has no cases supporting such a proposition and obviously could have none since the Uniform Commercial Code, Sec. 2-719(3) expressly authorizes the exclusion of consequential damages. Except in the case of personal injuries caused by consumer goods, such exclusions are not prima facie unconscionable. If Southwest is claiming that exclusions of consequential damages for commercial losses are automatically unconscionable, as a matter of law, the argument is easily answered by the plain language of Sec. 2-719(3).

Sec. 2-302(2) of the Uniform Commercial Code indicates the question of unconscionability is one of fact for the court to decide based on all the circumstances and the commercial setting of the sale. Southwest has already stipulated that it has no more evidence on the question of which warranty governs, which necessarily includes the question of whether any portion of the governing warranty should be excluded as unconscionable. Southwest, in support of its post-trial motion which first raised the issue of unconscionability, avowed to the court that it had no more factual evidence on the point of which warranty governed and expressly denied that it was asking the court to reopen the case to take more evidence (R. 1134). Southwest then, in an astounding reversal, argues that it "was denied the opportunity to present evidence as to its [the Westinghouse warranty] commercial setting" (Appellant's Brief, p. 46). Superimposed on all of these superfluities is Southwest's argument that the issue of unconscionability really is properly here for decision because it was in fact *tried by the court* below (Appellant's Brief, p. 38). If this be so, the

court obviously upheld its conscionability. Southwest makes no claim that the court's finding is clearly erroneous and has therefore not created an issue requiring reversal.

The cases submitted by Southwest in support of its argument add nothing to its argument. They are *Jarnot v. Ford Motor Co.,* 191 Pa. Super. 422, 156 A.2d 568 (1959) (overruled on another point in 422 Pa. 383, 221 A.2d 320 at 325 (1966); *Cox Motor Car Co. v. Castle,* 402 S.W.2d 429 (Ct. App. Ky. 1966); *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); and *Armco Steel Corp. v. Ford Constr. Co.,* 237 Ark. 272, 372 S.W.2d 630 (1963). None of them involves a claim of unconscionability. The *Cox Motor Co.* case and the *Armco* case both expressly point out that exclusions of consequential damages are proper. *Seely* and *Jarnot* did not involve warranties which excluded consequential damages.

Southwest makes one additional assertion that requires response. It now claims that the allegations of its antitrust count (which was severed for trial) may make the contract unconscionable. This argument is wholly new on appeal—it wasn't even raised in the motion to alter and amend the judgment. Southwest cites no case remotely indicating that an unconscionable price provision, if proven, should, as a matter of law, make unconscionable a separate warranty provision. Sec. 2-302(1) of the Uniform Commercial Code certainly does not dictate such a result.

The whole issue of unconscionability is simply not properly here for review. If it were, Southwest has shown no error in its presentation of its Question III. Surely the exclusion is not unconscionable as a matter of law since the Uniform Commercial Code expressly authorizes such exclusions. If Southwest has no more evidence on the point as it has stated, there is no error since the record certainly doesn't compel a finding of unconscionability. If the issue

of unconscionability was in fact tried by the court, as Southwest has also contended, Southwest has failed to show or even to claim that the court's finding was clearly erroneous.

III. Under Pennsylvania Law, the Agreement of the Parties Excluding Consequential Damages Precludes Recovery of Such Damages for Negligence as Well as for Breach of Warranty.

Southwest phrases its question IV as follows:

> "When the record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, then was it proper for the court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence?"

Again, we are compelled to point out what the record in this case is and what actually occurred below. The "record on appeal" to which Southwest now refers in Question IV, is a "Summary of Depositions" gratuitously inserted as Appendix 2 of Southwest's brief. It is Southwest's interpretation of a few passages in a few of the many depositions taken. No part of this "Record on Appeal" is in the stipulated record upon which the trial court decided this case. While Southwest's present counsel may think that it is "imperative that the Court be informed of the contents of a few portions of the multitude of depositions" (Appellant's Brief, p. 52), Southwest's trial counsel did not. The reason is simple. At trial, it was agreed and understood that the two stipulated questions presented to the court would dispose of the entire case if the court ruled in favor of Westinghouse on both of them, whether or not other evidence tending to show negligence on the part of Westinghouse existed. The court first decided that the governing warranty was the Westinghouse warranty. The court then decided that, under

applicable Pennsylvania law, the warranty language excluded consequential damages on a theory of negligent breach of warranty. The cases relied upon by the court in making this ruling are collected at R. 1006. Even now Southwest makes no attack upon this ruling or the cases cited, so we will not lengthen this brief with an unnecessary discussion of Pennsylvania law to show that the court was clearly correct in its ruling. Under the theory of the case as it was tried, the court's ruling on the two agreed questions disposed of the case and Southwest never contended at that time that it did not.

What Southwest now seems to be arguing is that Arizona law created an independent tort liability, wholly apart from any contract, by which Southwest may recover consequential economic losses for the alleged negligence of Westinghouse in manufacturing and repairing the unit. The trial court did note in passing that such a theory would not allow recovery to Southwest (R. 983). But Southwest had already conceded that point. Its present argument again completely ignores the posture this case was in when it was decided.

Southwest repeatedly represented to the court below that no duty was owed by Westinghouse to Southwest other than that created by contract, whatever that contract was. It characterized its whole negligence theory as one of "negligent breach of warranty." In fact, the principal argument advanced by Southwest in support of its last-minute motion to reallege its warranty count was that Westinghouse would not be prejudiced by the amendment since, even under the negligence count, Southwest would have to prove a contract in order to create any duty on Westinghouse which could result in liability.

In its memorandum in support of its motion to amend, Southwest asserted that Westinghouse "is mistaken in be-

of unconscionability was in fact tried by the court, as Southwest has also contended, Southwest has failed to show or even to claim that the court's finding was clearly erroneous.

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In its memorandum in support of its motion to amend, Southwest asserted that Westinghouse "is mistaken in be-

lieving that plaintiff has abandoned its claim for breach of warranty." (R. 852). Southwest stated:

> "Although the pleading [old Count One] sounds in tort, the relationship between the parties is based upon contract. Plaintiff must prove the contract and its terms in order to establish the relationship between the parties out of which defendant's duty arises." (R. 853).

Southwest repeatedly asserted, in oral argument on the motion to amend, that its theory was still one of contract (T. Aug. 1, pp. 1-6, 22-23). Following the allowance of the amendment, in resisting Southwest's renewed motion for summary judgment Southwest did not argue any tort theory independent of contract and expressly argued that any duty on Westinghouse necessarily had to be based on a contract (T. Aug. 7, pp. 24-33). Southwest simply argued that it relied on its form of warranty, that the Westinghouse limitation was not part of the contract between the parties, and that evidence of the Westinghouse limitation was barred by the parol evidence rule.

Then at the trial, the parties stipulated to the two issues to be submitted to the court with the clear understanding that they disposed of the entire case if both were decided favorably to Westinghouse. In arguing the case on August 11, Southwest argued mainly that its form of warranty applied. It further argued that even if the Westinghouse warranty applied, it would not bar recovery on a negligence theory under Pennsylvania law. But it certainly did not argue, as Southwest now apparently does on appeal, that Arizona law created an independent tort duty, wholly apart from any contract, which would impose liability upon Westinghouse for alleged negligent manufacture and repair of the unit. The only possible reference to an independent tort duty was when Southwest's counsel claimed that if Westing-

house was negligent in the flushing procedures during erection of the unit, Westinghouse might be liable to Southwest under a theory of trespass (A.T. 277). However, this argument was quickly dispelled when it was pointed out that Rust had the responsibility of erecting the mill, that the contract for the services of a Westinghouse engineer to provide advice during erection was between Rust and Westinghouse and that Southwest never claimed or pleaded any third party beneficiary theory (A.T. 279-82). Certainly nothing was said about any independent duty relative to the manufacture or repair of the unit.

After the court decided the case, it expressly made inquiry as to whether there was anything further to be done of record (A.T. 286, 288). Southwest did not then claim that any theory of the case remained alive. The court also noted both in its opinion (R. 983) and its order and judgment (R. 1010) that there was no evidence before the court that Westinghouse had failed to perform its affirmative warranty duties of repair or replacement. Southwest said nothing. Nor did it in its later objection to the form of judgment. (R. 976). Southwest, having repeatedly represented to the court that it was relying on a contract to create a duty between Westinghouse and Southwest, and having tried the case on that theory, is not now in a position to shift its theory on appeal. Again, we refer to the authorities collected in Sec. II-A of the argument section of this brief.

Even if Southwest could now urge such a theory, it has failed to show the legal validity of such a theory. Southwest relies upon and discusses at length two cases dealing with sales of equipment, *Pipewelding Supply Co., Inc., v. Gas Atmospheres, Inc.,* 201 F. Supp. 191 (N.D. Ohio 1961); and *Asphaltic Enterprises, Inc., v. Baldwin-Lima-Hamilton Corporation,* 39 F.R.D. 574 (E.D. Pa. 1966). The discussion

of those two cases by Southwest, given the context in which the issue was presented and decided below, is incomplete. In the first place, both cases involve the application of *New York* law prior to the adoption by that state of the Uniform Commercial Code. The *Pipewelding* case expressly held that the exclusion of consequential damages contained in the warranty there involved barred plaintiff's claim in warranty but that, under the law of *New York,* the limitation of liability was not effective as an exemption of liability for negligence. 201 F. Supp. at 199. In the instant case, Pennsylvania law governs and Southwest does not challenge the correctness of the trial court's ruling that it bars recovery for negligent breach of warrranty.

In the *Asphaltic Enterprises* case, the only thing the court determined was that plaintiff had stated a claim, for purposes of a motion to dismiss, by alleging an express warranty, a breach thereof and resulting damages. The motion to dismiss referred to a provision in the sales agreement excluding liability for consequential damages. The court expressly recognized that parties can exclude consequential damages. But since defendant did not deny that there was in fact a breach of the express warranty, the court simply held plaintiff had stated a claim. In doing so, however, the court indicated it had grave doubts that plaintiff could recover since the damages alleged were consequential. But, noting the rule that plaintiff is entitled to any type of relief to which he may ultimately be shown to be entitled, the court denied the motion.

Here there clearly was no duty on Westinghouse to manufacture or to repair the unit in the absence of the contract. The contract expressly covered those points. Therefore, even under the Arizona case of *McClure v. Johnson,* 50 Ariz. 76, 69 P.2d 573 (1937), now relied upon by Southwest, the action sounds in contract. The other case cited by Southwest,

Apache Railway Co. v. Shumway, 62 Ariz. 359, 158 P.2d 142 (1945), a death action under the Federal Employees' Liability Act, is wholly inapplicable.

Nor has Southwest made any showing, as a matter of Arizona or general tort law, that recovery is available for its claimed economic losses as a result of a pure tort theory unrelated to some contractual obligation. There is no Arizona decision allowing recovery on a theory of negligent infliction of economic loss. The Restatement is most persuasive in the Arizona courts in determining matters as to which no Arizona case law has developed. *See, e.g., Rodriguez v. Terry,* 79 Ariz. 348, 290 P.2d 248 (1955); *Matland v. United States,* 285 F.2d 752 (3rd Cir. 1961). There is nothing in the Restatement *(Second)* of Torts to support recovery on the present undisputed facts. Its provisions as to the liability of persons supplying chattels for the use of others, Secs. 388 *et seq.,* extends the liability of such a person only to cases where *physical harm* is caused by the use of the chattel. This same limitation expressly appears in Sections 388, 389 and 390 and is also incorporated by reference into the later sections of that topic.

Courts in jurisdictions other than Arizona have refused to allow recovery on theories of negligent interference with contract, negligent interference with prospective advantage, or negligent infliction of economic loss.* Recovery is denied in such cases because the damages suffered are too remote, uncertain, or disproportionate to culpability.† The treatises

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*See, *e.g., Byrd v. English,* 117 Ga. 191, 43 S.E. 419 (1903); *Stevenson v. East Ohio Gas Co.,* 47 Ohio L. Ab. 586, 73 N.E.2d 200 (1946); *Ultra Mares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931); *Polo v. Edelbrau Brewery,* 185 Misc. 775, 60 N.Y.S. 2d 346 (App. Term 1945).

†See, *e.g., The Federal No. 2,* 21 F.2d 313 (2d Cir. 1927); *Northern States Contracting Co. v. Oakes,* 191 Minn. 88, 253 N.W. 371 (1934); *Brink v. Wabash R. R. Co.,* 160 Mo. 87, 60 S.W. 1058 (1901); *Cain v. Vollmer,* 19 Ida. 163, 112 P. 686 (1910); *City of Oxford v. Spears,* 228 Miss. 433, 87 So.2d 914 (1956).

confirm that such losses, to be compensable, must result from an intentional tort. See W. Prosser, *Torts,* Sec. 106-07 (2d ed. 1955); 1 F. Harper & F. James, *Torts,* Sec. 6.10, at 509-10 (1956).

In summary of Southwest's argument on its fourth question: 1) the case was tried on the theory that a contract was necessary to impose any duty on Westinghouse; 2) the court held that, under Pennsylvania law, the warranty language barred recovery on a theory of negligent breach of warranty and Southwest does not here challenge that ruling; 3) to the extent Southwest now seeks to impose liability for consequential economic loss on a pure tort theory absent any contractual arrangement, the claim comes too late but is, in any event, not meritorious under principles of tort law.

IV. Southwest's Present Theory That Some Portion of Its Damages Are "Incidental" Rather Than "Consequential" Presents No Reversible Error.

A. The Theory of "Incidental" Damages Was Never Presented or Litigated Below and Should Not Be Considered on Appeal.

Southwest does not attempt to show that its present theory of incidental damages was timely presented below, but merely suggests that "Southwest may have computed their damages through the use of an improper measure of damages" (Appellant's Brief, p. 62). This theory is purely an afterthought. Had the court accepted Southwest's primary position at trial, it would have made no difference how its damages were characterized. Its warranty covered any and all types of damages.

By everything Southwest did and said in this case, it cannot now be permitted to advance this theory on appeal. To show how grossly untimely this theory is and how contradictory it is to Southwest's earlier position, it is only

necessary to refer to some of the history of this litigation which bears on the point: 1) Early in the case Westinghouse asked Southwest by interrogatory to itemize its consequential damages (R. 24). Southwest responded, characterizing all of its alleged damages as consequential, and giving a breakdown thereof (R. 64). 2) The motion for summary judgment directed to Southwest's strict liability in tort theory was based, in large part, upon the proposition that Southwest could not recover consequential economic damages under such a theory (R. 700-19). This motion was thoroughly briefed. At no time did Southwest contend its damages were not consequential. 3) The motion for summary judgment on the warranty count had, as its principal point, the argument that Southwest could not recover consequential damages because the Westinghouse form of warranty excluded such damages (R. 720-32). In the face of this, Southwest, without mentioning incidental damages, abandoned its warranty count. 4) When Southwest amended its damage interrogatories after the pretrial, it again expressly characterized them as consequential (R. 789). 5) The motion for summary judgment on the negligence count was based on the point that damages of the type Southwest was claiming could not be recovered under that theory (R. 808-24). Southwest responded to that motion and argued it, again without reference to incidental damages (R. 852-62). 6) When Southwest sought to reinstate its warranty count and to rely upon the Southwest purchase order of July 6, 1960, Southwest's counsel argued, in support of the motion to amend, that Westinghouse would not be prejudiced by the amendment because "They [the damages] obviously are consequential and have been all along" (T. Aug. 1, p. 21) and that "the damages claimed are those damages which the courts characterize as consequential damages." (T. Aug. 1, p. 21-22). 7) When the renewed motions for summary

judgment were argued the day before the trial on the ground that the Westinghouse warranty applied and excluded consequential damages, no mention was made by Southwest of any claim for incidental damages (T. Aug. 7, pp. 24-33). 8) After the trial began and the parties agreed to submit the issues to the court for decision, the second stipulated question was

> "Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?" (R. 1009)

9) When the parties argued the case at length on August 11, no reference was made by Southwest to incidental damages (A.T. 261-79). 10) When the court ruled that the Westinghouse warranty applied, it expressly noted that, "there's no question by stipulation of counsel that these are what are legally termed consequential damages." (A. T. 286). Southwest did not deny such a stipulation. 11) Following the ruling of the court a formal order and judgment as well as a detailed opinion, both of which referred expressly to consequential damages, were prepared and filed by the court (R. 978 and 1008). Southwest objected to the proposed form of judgment but again did not refer to incidental damages (R. 976).

Only after Southwest had changed attorneys after final judgment did the theory of incidental damages come into the picture. It was asserted in the motion to alter and amend that the judgment was erroneous because *Westinghouse* had failed to show as a matter of law that not all of Southwest's damages were consequential! The trial court expressly made note of the fact, ruling on the post-trial motion, that the theory of Southwest throughout all prior proceedings had been that its damages were consequential in nature (T. Dec. 4, p. 26).

By its own selection of theories and its stipulations and conduct, Southwest should now be barred from asserting this theory. It would be hard to imagine a case in which a theory is more untimely or more contradictory to the position taken by a party throughout the case. The same considerations and the same authorities submitted above in connection with the untimeliness of the theory of unconscionability apply here. The court need not and should not consider this theory.

B. Even Assuming Southwest's Theory of "Incidental" Damages Were Properly Here for Consideration, Southwest Has Shown No Error Because Its Claimed Damages Are Not Incidental Damages.

By the time of trial, Southwest had amended its damage claim to approximately $2,530,000 (R. 789 *et seq.*). Practically all of that amount was calculated by taking a daily overhead figure for the mill of $31,403, and charging to Westinghouse a proportion of that amount for each day in which the mill's actual production was less than the mill's alleged rated daily capacity. The proportion of daily overhead charged was the proportion which actual production bore to rated production capacity. This item of claimed damage amounted to approximately $2,450,000 of its total claim of approximately $2,530,000. The balance of the claim was for the expense of solid caustic allegedly purchased to offset recovery boiler loss plus some extremely miniscule repair costs (approximately $2,300).

Sec. 2-715(2) of the Uniform Commercial Code defines consequential damages as including "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; . . ." Sec. 2-715(1) of the Uniform Commercial Code defines incidental damages as including "expenses reason-

ably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."

Southwest's alleged overhead expense loss of approximately $2,450,000 constituted by far the greatest portion of the damages claimed. Southwest accepts the fact that those expenses are consequential in nature and does not argue in its brief that they are incidental. The caustic expense also clearly is consequential by reason of the definition of Sec. 2-715(2) set forth above. That leaves the claim for alleged repair which is a mere $2,300 out of a claim of approximately $2,530,000. Assuming the repair expenses fell within the definition of incidental damages, no one would have considered trying this case for that claim, even if Southwest had then claimed those damages were incidental and even if the court would have relieved Southwest of all its avowals and stipulations that all its damages were consequential. The repair claim was not in the minds of the parties at all. But had the case gotten to a consideration of it, there is an independent reason why Southwest could not recover even if the damages were characterized as incidental. The Westinghouse warranty provided in part

> "such correction [of defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part or parts] shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages." (Ex. DDD, App. 13).

Throughout the District Court proceedings Westinghouse relied upon Section 2-719(3), which permits consequential damages to be limited or excluded, since Southwest had agreed its damages were all consequential. Sec. 2-719(1)(a), however, also permits the limitation of alteration of "the measure of damages *recoverable under this Article,* as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming good or parts;. . ."

The limitation or alteration of the measure of damages permitted by Sec. 2-719(1)(a) is far more general than the specific reference to the limitation or exclusion of consequential damages provided in Sec. 2-719(3). A limitation in accord with Sec. 2-719(1)(a) was provided in the phrase of the Westinghouse form of warranty stating that "such correction shall constitute a fulfillment of all Westinghouse liabilities." Therefore whether Southwest's damages are considered "consequential" or "incidental" still remains immaterial, even if the question were properly here.

V. The Doctrine of Strict Liability in Tort Is Inapplicable to This Case.

At last we reach an issue in this case which was presented to the trial court, was ruled upon by the trial court and is legitimately here for review and decision. Southwest did allege, by amendment to its complaint, a theory of strict liability in tort. Following discovery, Westinghouse moved for summary judgment on that count. The court granted it. Westinghouse submits the court was right. The court stated that it granted the motion because:

> ". . . the principles underlying the doctrine of strict liability in tort for defective products were not applicable. All damages sought by Southwest in this case are consequential damages. The turbine generator unit is a highly specialized, custom-built piece of ma-

chinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.

"The circumstances of this case do not bring the plaintiff within the class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved support an extension of the doctrine of strict liability in tort to the present facts." (R. 981-82).

At the time the motion for summary judgment was briefed, argued and granted, the damages claimed by Southwest consisted of the following items: excess of Southwest's costs (excluding depreciation) over sales, interest expenses, general and administrative expenses, loss of revenue and profits, interest on additional borrowings, cost of a certain contract for electrical power, and loss of proceeds on a stock subscription.* As to the strict liability in tort theory, the parties agreed that Arizona law applied.

Southwest devotes a considerable portion of its argument to the proposition that Arizona has adopted the doctrine of strict liability in tort. With this, Westinghouse has no quarrel. Although no state decisions had adopted the doctrine in Arizona at the time the District Court granted the motion, two Arizona cases, *O. S. Stapley Co. v. Miller,* 6 Ariz. App. 122, 430 P.2d 701 (1967), and *Bailey v. Montgomery Ward & Co.,* 6 Ariz. App. 213, 431 P.2d 108 (1967), were decided before the court's formal opinion was pre-

*After the motion was granted Southwest amended its answers to interrogatories which modified, in some respects, Southwest's damage claim. However, all damages were still characterized by Southwest as consequential and Southwest did not claim that the amendment of damages required any reconsideration of the summary judgment previously granted on the strict liability in tort theory.

pared and were taken into account by it (T. 998, App. 70). These decisions confirm the correctness of the District Court's ruling.

The question is not whether Arizona has adopted the doctrine, but whether the doctrine has any applicability to this case. Southwest makes no analysis of the cogent reasons which led the trial court to rule as it did and cites no single case which supports its argument that strict liability in tort should apply in this situation. It relies *solely* upon the dissent of Justice Peters in the California case of *Seely v. White Motor Company,* 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). An analysis of the doctrine and the rationale which led to its adoption demonstrates that the doctrine is inapplicable to the case at bar.

In *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962), and *Vandermark v. Ford Motor Company,* 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), the leading cases developing strict liability, the doctrine's purpose was declared to be that the cost of *personal injuries* should be borne by responsible manufacturers rather than by injured consumers powerless to protect themselves. The Arizona court in *Stapley, supra,* following *Greenman* held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, *proves to have a defect that causes injury to a human being,*" (emphasis added) 430 P.2d at 706. The Arizona court approvingly cited *Rossignol v. Danbury School of Aeronautics,* 154 Conn. 549, 227 A.2d 418, 424 (1967) in which the Connecticut court, applying the elements set forth in Restatement (Second) Torts Sec. 402(A), required as a basis for recovery that the defective product cause "physical harm to the consumer or user or to his property." The Arizona *Bailey* case also involved personal injury to an individual consumer. More recently, *Tucson Gen. Hosp. v. Russell,* 7 Ariz.

App. 193, 437 P.2d 677, 681 (1968), has expressly approved the Restatement, Torts (Second) Sec. 402(A) definition of strict liability. It is:

> "One who sells any product in a defective condition *unreasonably dangerous to the user or consumer or to his property* is subject to liability *for physical harm* thereby caused *to the ultimate user or consumer or to his property* [upon certain conditions]." (Emphasis added.) Restatement, Torts (Second), Sec. 402(A).

The Comments to this section repeatedly limit the scope of strict liability in tort to physical harm to consumers or their property. For example, see Comment (b): "physical harm to the consumer or his property," Comment (d): "'physical harm' in the form of damage to the user's land or chattels," and Comment (f):

> "The basis for the rule [of strict liability in tort] is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."

In *Seely v. White Motor Co.,* 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), the California Supreme Court, which originally promulgated the doctrine, expressly limited it to physical injuries to persons or property. Even Justice Peter's dissent would not apply the doctrine to the Westinghouse-Southwest sale because it would extend recovery only to consequential losses suffered by individual consumers. But the plain fact is that the courts have been following the view expressed by the court in the *Seely* opinion and not the dissent. See, *e.g., Price v. Gatlin,* 241 Ore. 315, 405 P.2d 502 (1965); *Ford Motor Company v. Lonan,* 217 Tenn. 400, 198 S.W.2d 240 (1966); *Brewer v.*

Reliable Automotive Co., 49 Cal. Rptr. 498 (D. Ct. of App. 1966); *Dealers' Transport Co. v. Battery Dist. Co.*, 402 S.W. 2d 441 (Ky. 1966).

No personal injury is involved in this case. No claim for damage to Southwest's property was made.* Southwest never contended that the turbine generator was unreasonably dangerous to persons or property. Their contention is solely that it did not perform according to Southwest's alleged expectations.

Southwest is not a consumer of the type the doctrine seeks to protect from personal injury. The assets of the Snowflake Division alone were in excess of $37,000,000 in 1962 and in excess of $41,000,000 in 1964 (R. 137). The Snowflake mill alone employed 426 persons in July, 1964 (R. 55). The turbine generator unit's purchase was not a casual over-the-counter transaction. This is not the case of an individual consumer buying a standard product and being entirely dependent upon the skill and judgment of the seller as to its safety. Negotiations for the purchase of the generator and development of the electrical requirements of the mill were extensive, required substantial time, and were accomplished in a purely commercial context between corporations of substantial size. They were initiated and implemented by Rust, a highly skilled specialized agent of Southwest. A 25,000 kilowatt turbine generator unit, as the District Court found, is a custom built, highly complicated machine, whose specifications were tailored on an individual basis to the purchaser's requirements after a full analysis of the anticipated electrical needs had been made

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*Southwest now advances an argument (Appellant's Brief, p. 67) that there was in fact physical damage done to plaintiff's property in that a cylinder wall and piston were scored and some armature bars were damaged. Southwest did not and does not now seek damages for a scored piston and cylinder or armature bars.

by Rust. Engineers from Rust and Westinghouse together supervised the factory bench tests (R. 981).

No court has ever held that recovery based on strict liability under the circumstances of this case should be allowed. The doctrine has been unanimously limited at some point short of the present facts. The Arizona court, which had followed California cases on the doctrine, would certainly follow *Seely, supra.* The *Seely* case provides a complete answer to Southwest's contentions in this case, for as the trial court correctly stated:

> "The *Seely* opinion, *supra,* [*Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965)] makes it plain that the law of warranty recovery for economic loss has not been entirely superseded by strict liability in tort in a commercial setting, that it is inappropriate to hold a manufacturer responsible for the quality of performance of its products in a purchaser's business unless it agrees that the product was designed to meet the purchaser's demands, and that the risk that the product will not meet the purchaser's economic expectations may fairly be charged to the purchaser unless the manufacturer agrees it will bear that risk. There was no such agreement in this case." (R. 996).

Given the facts and circumstances of this case, the nature of the transaction and the type of damages claimed, Westinghouse submits the trial court was clearly correct in ruling that the doctrine of strict liability in tort was inapplicable.

VI. By Southwest's Election, the Question of Whether Implied Warranties Ran with the Sale or Were Excluded by the Language of the Westinghouse Warranty Was Not Presented or Decided Below and Should Not Be Considered Here.

Southwest phrases its last question as follows:

> "When a seller has not disclaimed express and implied warranties, can the seller effectively disclaim express

and implied warranties given by merely restricting the damages and remedies of the buyer without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code?*"

The argument advanced by Southwest in support of this question is wholly new on appeal. It was not even raised in the post-trial motion to alter and amend. Irrelevant abstract questions of law or fact should not be decided in the complete absence of a record and without benefit of a trial court's initial determination. Westinghouse believes it would be most inappropriate for the court to consider the question presented above.

First of all, Southwest's argument is again based upon a complete reversal of the position it took at trial. At trial, Southwest elected to rely primarily on its theory that the governing warranty was not the Westinghouse warranty but was the Southwest warranty. Its alternative theory was that if the Westinghouse warranty applied, Pennsylvania law should not be so construed as to bar its claim for consequential damages. It never presented a claim for non-consequential damages under any asserted implied warranty. Therefore, the court never had occasion to consider or determine the question of whether the language of the Westinghouse warranty effectively excluded all implied warranties. Secondly, the argument is based upon the unfounded and unsuggested assumption that the Westinghouse warranty is in fact unconscionable. Thirdly, it superimposes a new assumption: that the Westinghouse warranty was inconspicuous, a matter which has never been mentioned below. We merely note that it was not so inconspicuous but that the court found the parties' minds had expressly met and agreed upon its terms and conditions.

Fourthly, the Southwest argument ignores the provisions of the Uniform Commercial Code. Southwest equates exclusions of consequential damages with disclaimers of implied warranties. They are two different things. Exclusion of consequential damages is provided for by Sec. 2-719, "Contractual Modification or Limitation of Remedy" which provides, in subsection (3):

> "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Disclaimers of implied warranties are dealt with in Sec. 2-316 (2) which provides:

> "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof'."

Subsection (3) of 2-316 provides certain exceptions to the requirements of subsection (2):

> "(3) Notwithstanding subsection (2)
>
> "(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> "(b) when the buyer before entering into the contract has examined the goods or the sample or model

as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

"(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

What Southwest is really asking this court to do is to amend the Uniform Commercial Code to provide that a seller may never exclude consequential damages unless he complies with the requirements of the Code relating to the complete disclaimer of all express and implied warranties. The authors of the Code and the Pennsylvania legislature provided that parties dealing in a commercial context could agree to exclude or allocate damages, whether or not they also agreed to exclude all express and implied warranties.

Had Southwest elected to proceed against Westinghouse for non-consequential damages for breach of implied warranties, the trial court would then have to have decided whether the language of the Westinghouse warranty did or did not exclude implied warranties, assuming Westinghouse asserted that it did. In that event, it may well have been necessary to take evidence to see whether the exceptions of Sec. 2-316(3) applied, assuming the court first held that implied warranties were not otherwise excluded under Sec. 2-316(2). Evidence that Rust examined and inspected the machine during manufacture and witnessed tests of it would have become relevant. Evidence relative to course of dealing, course of performance, and usage of the trade would have to be considered. None of these questions was determined and no evidence was taken. None was necessary under Southwest's theory. The issue was first raised on appeal. It cannot be decided in a vacuum. Southwest has shown no error on this point.

CONCLUSION

The doctrine of strict liability in tort was correctly held to be inapplicable to this case. The remaining theories now presented by Southwest were not timely preserved for appeal and are, in many instances, contradictory to Southwest's earlier theories and should not now be considered. Assuming, *arguendo,* that Southwest had properly preserved them for appeal, Southwest has failed to carry its burden of showing reversible error. The judgment should be affirmed.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By JOHN J. FLYNN
JAMES MOELLER
PAUL G. ULRICH

November, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES MOELLER

No. 22,696

In the

United States Court of Appeals

for the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC.,
Appellant,

vs.

WESTINGHOUSE ELECTRIC CORP.,
Appellee.

Reply Brief of Appellant Southwest Forest Industries, Inc.

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Reply Brief of Appellant Southwest Forest Industries, Inc.

THE STATEMENT OF CASE SUBMITTED BY WESTINGHOUSE CONTAINS PURPORTED FACTS NOT CONTAINED IN THE RECORD

The Court should be ever mindful that Southwest was the one who purchased the defective steam turbine generator unit sold by Westinghouse for $1,137,123.00 and that Southwest is the injured party and not Westinghouse.

Westinghouse has very cleverly and conveniently slanted its Statement of the Case by including therein many irrelevant and incorrect matters, which are not set forth in or supported by the record and are in direct violation of Rule 28(a)(3), *Federal Rules of Appellate Procedure,* which states in part: "There shall follow a statement of the facts relevant to the issues presented for review, *with appropriate references to the record* (see subdivision (e))." (Emphasis added)

Southwest feels it has no alternative but to point out some of the major items submitted by Westinghouse in its Statement of the Case which are either incorrect or without support in the record.

The following statement by Westinghouse (Appellee's Brief, p. 11) is gratituously made without the benefit of citation either to the Appeal Transcript or the Transcript of Proceedings, and Southwest submits that this statement is not in fact in the record:

> Had the court then known what everyone later learned, *i.e.*, that Southwest's own executives had always considered the applicable warranty to be the Westinghouse warranty and had in fact submitted the Westinghouse warranty to former counsel for an opinion when the matter first came up (a fact unknown to Southwest's trial counsel until Westinghouse discovered such proof in Southwest's records during trial), it undoubtedly would have denied the motion and the litigation would have been terminated at that point.

Westinghouse informs the Court on p. 12 of its Brief that: "Amazingly, this first document [invitation to bid which was sent by Rust to Westinghouse on May 3, 1960] is not even mentioned in Southwest's opening brief." The Court will find on page 2 of Southwest's opening brief that Southwest specifically and clearly mentioned the invitation to bid sent by Rust to Westinghouse on May 3, 1960.

Contrary to Westinghouse's assertion, there is no testimony in the record to show that the Copy 25 was sent by Westinghouse to Rust or that Rust received the same from Westinghouse. (See Appellee's Brief, p. 13). Suto, in her deposition, merely states she put this document in a mail-out bin and in turn someone else would pick it up and someone in the mailroom would mail it out. There is no specific testimony that Ann Suto in fact mailed a Copy 25 to Rust (Depo. of Suto, pp. 12-13). Mr. Rice in his deposition merely said in response to a question asking him if he knew what happened to Copy 25: "Well, personally I can't say I know, except the fact that they sent them out to the customer. I mean, that is the standard way of what we did with them." (Depo. of Rice, pp. 18-19).

Westinghouse, on page 15 of its Brief, incorrectly quotes the stamp placed on the Southwest purchase order by Mr. Rice. The correct quotation should be as follows: "* * * Order accepted subject to conditions outlined in attached W. E. Corp. form of acknowledgement." (Ex. 2-A, App. p. 26).

Westinghouse provides no citation to the record for the following sentence contained on p. 15 of its Brief:

> The word 'attached' was crossed out by Mr. Rice because the Westinghouse acknowledgement form (Copy 25) had already been sent to Rust on June 13, 1960, when the order had been written up following receipt by Westinghouse of the letter of intent.

In this regard, the Court should see the testimony of Westinghouse employees Suto and Rice in their Depositions at pp. 12-13 and pp. 18-19, respectively.

Westinghouse, on p. 17 of its Brief, provides no citation as to the location in the record of the following reported fact: "On no occasion did Rust or Southwest make any inquiry of Westinghouse or express any questions relative to the Westinghouse terms and conditions in this case."

Westinghouse, on pp. 17-18 of its Brief, states:

> By this point, it was obvious that two documents assumed considerable importance. The first was 'Copy 25,' the order acknowledgement form, prepared by Westinghouse following receipt of the Rust letter of intent. *This was important because it showed Westinghouse considered the letter of intent as an order and because its return to Rust restated the Westinghouse warranty in the same terms as the Westinghouse proposal of May 18, 1960, to which the Rust letter of intent had responded.* The Westinghouse testimony was that Copy 25 had been sent to Rust on June 13, 1960. Rust said its file was lost and it did not know if it had received Copy 25 (Id., p. 17, 24). (Emphasis added)

As previously shown by Southwest, there is no testimony in the record to show that the Copy 25 was actually sent to Rust and, as Westinghouse states, there is no testimony to show posi-

tively that Rust received the Copy 25. Additionally, the testimony of John J. Sherman, Sales Engineer for Westinghouse and the sales representative who dealt with Rust in the sale of the turbine generator in question (TR* 371), admitted that even Westinghouse did not consider that it had an order for the steam turbine generator until it received the Southwest purchase order dated July 6, 1960 (Ex. 2-A, App. p. 26). Mr. Sherman testified:

> Q. Did you know that sometime after your form of general order was prepared, that Westinghouse Electric Corporation received a formal purchase order from Southwest Forest Industries for the turbine generator?
>
> A. I would know that that happened.
>
> Q. Do you have a recollection that in fact it did happen?
>
> A. Yes, because this is the way the salesman gets his credit, *when the treasury and order departments say we really have an order from the customer at this stage of the game.*
>
> (Depo. of Sherman, 8/4/67, p. 11) (Emphasis added)

Also, Mr. John J. Rice, a Westinghouse order correspondent, testified that he understood that Southwest would send a formal purchase order following the letter of intent of June 6, 1960. Mr. Rice testified as follows:

> Q. I will show you a document which I will mark as Rice 5 and ask you if this is a copy of that letter of intent?
>
> (Thereupon, Rice Exhibit No. 5 was marked for identification).
>
> A. Yes, yes.
>
> Q. *Did you understand, when you read this, sir, that there would be coming from the customer a formal order to cover the purchase?*
>
> A. *Yes.*
>
> Q. And did the formal order eventually come?
>
> A. Yes, it did.
>
> (Depo. of Rice, pp. 11-12, dated 8/5/67) (Emphasis added)

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*Transcript of Record.

Westinghouse, on p. 19 of its Brief, incorrectly states that Mr. Baker testified that the purchasing files maintained by Mr. McBride (*sic*) had been destroyed. In fact, Mr. Baker's testimony concerning the purchasing files was as follows: "A. *That has been destroyed, apparently. We have not found it. We don't keep them forever.*" (Depo. of Baker, 8/7/67, pp. 4-5) (Emphasis added)

Westinghouse continues to misquote the testimony of Mr. Baker on p. 19 of its Brief, wherein it states that Mr. Baker denied ever seeing a copy of the Southwest purchase order stamped by Westinghouse. The question asked of Mr. Baker by Westinghouse's counsel was whether Pl. Ex. 2-A was received by Mr. Baker, *personally*. In response thereto, Mr. Baker testified that as far as he could recall it was not. He also testified that Revisions Nos. 2, 3 and 4 were not received by him, *personally,* in direct response to Westinghouse counsel's question on this point. (See Depo. of Baker, 8/7/67, pp. 7-8).

Westinghouse, on pp. 23, 26 of its Brief, would improperly lead the Court to believe that Southwest is merely seizing upon the expression "renewed motion for summary judgment" and that a motion for summary judgment was never made by counsel for Westinghouse. This is not the fact. Mr. Flynn (lead counsel for Westinghouse) specifically and clearly informed the Lower Court on August 10, 1967, that:

> *I would like to supplement and make clear, we do at this time formally renew our motion for summary judgment,* or both motions for summary judgment heretofore made and I believe argued on Monday afternoon, and would request the court to reconsider the memorandums that were supplied at that time as being the memorandums in support of the motions which are on file. (TP* 224) (Emphasis added)

The Court was under no impression other than that Westinghouse was renewing its motion for summary judgment, for on the proceedings held August 11, 1967, the Court made the record perfectly clear and stated outside the hearing of the jury:

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*Transcript of Proceedings.

> *Before we start, just to make sure that on any review the record is perfectly clear,* following the request and discussion with counsel, that's on the record for yesterday afternoon, *the defendant has renewed its motion for summary judgment on all portions of the complaint as presently amended and before the court other than the anti-trust count and the plaintiff concurs in this procedure;* is that correct? (TP 229) (Emphasis added)

Westinghouse, on p. 24 of its Brief, makes the broad statement, without the support of citation to the record, that: "It was understood by all involved that if the court ruled in favor of Westinghouse on both questions being submitted, the case was over."

ARGUMENT

INTRODUCTION:

SOUTHWEST WILL REPLY TO THE ARGUMENTS OF WESTINGHOUSE GENERALLY IN SEQUENCE, EXCEPT SECTIONS III AND V WILL BE DEALT WITH TOGETHER SINCE THEY ARE INTERRELATED.

I. (A) The Court Cannot Grant a Motion for Summary Judgment When the Moving Party Failed to Establish That There Were No Genuine Issues as to Material Facts, Even Though Counsel May Agree as to the Historic Facts.

Westinghouse has very cleverly and skillfully attempted to ". . . set forth at some length the procedural history of this case because, we submit, it demolishes Southwest's argument that this is a summary judgment case." (Appellee's Brief, p. 28), even in light of the fact that none of the parties, including the Lower Court considered Westinghouse's motion other than as a renewed motion for summary judgment. (See TP 224, 229)

Consequently, it is submitted that under no circumstances does the lengthy procedural history set forth by Westinghouse demolish Southwest's argument that this was a summary judgment case as the record appropriately reflects. (See also TR 979, 1010-11)

Even at this date, Westinghouse does not contend that it established on its motion for summary judgment that there were no genuine issues as to material facts. Westinghouse merely relies on

the agreement by counsel and upon the Court's Opinion in granting Westinghouse's motion for partial summary judgment.

Westinghouse purports to be surprised that Southwest could now dispute the plain fact that both parties put in all the evidence they had on the critical issue and specifically requested the Court to decide the issue one way or the other; however, Westinghouse is attempting to assert this statement as a matter of fact when the record is void of any such request made by counsel for either party. (See Appellee's Brief, p. 29). In the event the record is not void of such a request, then it became the duty of Westinghouse to specifically point out to the Court where in the record the parties specifically requested the Court to decide the issue one way or the other. Westinghouse has not seen fit to so do.

Westinghouse, in an attempt to bolster its argument that the Court was specifically requested to decide the issue one way or the other, would suggest to this Court that ". . . the parties would hardly take time out in the middle of a trial to excuse the jury, enter into elaborate stipulations, and supplement the record with exhibits and depositions if the only purpose was to re-urge a motion for summary judgment which had once been denied." (Appellee's Brief, p. 29). However, Southwest would submit that if counsel and the Court had in fact agreed to a trial to the Court, as suggested by Westinghouse, then they would have taken the appropriate steps to protect their record as the lower court did when it stated, ". . . just to make sure that on any review the record is perfectly clear . . . the defendant has renewed its motion for summary judgment . . ." (TR 229).

Westinghouse has attempted to distinguish *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917); *Cram v. Sun Ins. Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967); and *Brawner v. Pearl Assurance Co.,* 267 F.2d 45 (9th Cir. 1958) by arguing that the counsel for Westinghouse and Southwest did not purport to bind the Court by agreements on questions of law and that they merely agreed *"on the facts".* (Appellee's Brief, p. 31) (Emphasis supplied). However, what Westinghouse fails to point out to this Court is that the historic

facts were not free from controversy and that the parties disagreed as to the inferences which were to be drawn therefrom. (See Argument of Counsel, App. pp. 78-86).

Westinghouse would now like to come within the ambit of *Gillespie v. Norris,* 231 F.2d 881 (9th Cir. 1956) and bases its present contention on the theory that the parties actually tried this matter to the Lower Court, even in light of the record which is contrary. (See TP, pp. 222-24, 229). At the outset, it should be noted that in *Gillespie* the appeal was dismissed as being premature, but with some hesitancy by the Court. The Court stated:

> It is with some hesitation that we have decided to dismiss the appeal. The points upon which this action is taken were not raised by the parties, and no argument has been heard upon these. *The form of the judgment gives us great trouble. There is doubt as to whether the intention was to enter a summary judgment, a partial summary judgment or a judgment on the merits. As a result, there is some confusion as to whether Rule 54(b) or 56(d), Federal Rules of Civil Procedure, 28 U.S.C.A., applies.* (231 F.2d 882-83) (Emphasis added)

Also, the Court noted in its Opinion that summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned.

Additionally, the *Gillespie* case is entirely distinguishable from the case at bar because: (1) the trial judge specifically found as a matter of law that there was no genuine issue of fact; (2) a jury was not presently empaneled and hearing the case; (3) the appeal was dismissed as being premature; and (4) the plaintiff had included,

> . . . in his statements of points on appeal a specification that '[T]he evidence is insufficient to support the findings of fact or judgment,' which must be based upon the assumption that the trial court considered the evidence.
> (231 F.2d 884)

Westinghouse also attempts to rely upon the case of *Demelle v. Interstate Commerce Commission,* 219 F.2d 619 (1st Cir. 1955), which involved an action by the Interstate Commerce

Commission to enjoin the defendant from carrying on interstate motor operations between points in Maine not covered by a certificate of public convenience and necessity issued by the Commission. "It was stipulated by the parties that there was no genuine issue as to any material fact and that the sole issue before the court was the interpretation of the defendant's irregular route authority." (219 F.2d 620) The Appellate Court affirmed the decision of the trial court in holding that when the District Court granted summary judgment there were no factual issues to be decided and no indication that any evidence would be offered in an attempt to prove what the intention of the Commission had been when such certificate was granted, and that the only dispute involved was the language of the certificate itself.

A most significant point in the *Demelle* case is the concurring opinion of Woodbury, Circuit Judge, wherein he stated:

> I concur in the result for I believe that it is more probable than not that the certificate means what Judge Clifford and this court think that it means. *However, I do not wish to go on record as subscribing to the proposition that the failure of the parties to raise a question of fact below, or their stipulation that no issue of fact existed, necessarily requires that this case be disposed of on the motion for summary judgment filed by the Commission under Rule 56(c).* (219 F.2d 622) (Emphasis added)

The *Demelle* case is distinguishable in that: (1) the sole issue was the interpretation of the clause in the certificate of convenience and necessity; (2) the parties stipulated that the sole issue was the interpretation of such clause; (3) the defendant based his argument on the theory that the certificate was ambiguous; and (4) of particular importance, a jury was not empaneled and hearing the case when the motion for summary judgment was presented to the Court.

The case of *Tripp v. May,* 189 F.2d 198 (7th Cir. 1951), cited by Westinghouse, involved an action to recover overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act. The defendant's answer denied liability and

asserted plaintiff's exemption from the provisions of the Act. Defendant thereupon filed a motion for summary judgment based upon the same grounds as set forth in its answer. The trial court denied defendant's motion and rendered findings of fact to the effect that throughout plaintiff's period of employment he was not employed in a bona fide administrative capacity. The Court thereupon, on oral motion of plaintiff, some ten days later rendered judgment for plaintiff.

On appeal, defendant urged a procedural error in that the plaintiff's oral motion for summary judgment was without notice. The Appellate Court held that under the circumstances disclosed by the record there was no procedural defect in such a disposition of the case. Additionally, and as a further reason for approving the entry of a judgment on the record presented to the Appellate Court, it stated:

> And, as suggested in 3 Barron and Holtzoff § 1239: '*In a nonjury case* if both parties move for summary judgment and the court finds that there are issues of fact but that the facts have been fully developed at the hearing on the motions, the court may proceed to decide the factual issues and give judgment on the merits. This of course amounts to a trial of the case and is not technically a disposition by a summary judgment.' (189 F.2d 200) (Emphasis added)

The Appellate Court then went on to determine whether the facts were sufficient as a matter of law to establish that the plaintiff was an exempt employee under the Fair Labor Standards Act provisions, and subsequently affirmed the judgment.

The *Tripp* case is inappropriate to the case at bar and is distinguishable in that a jury was not empaneled and actually hearing the case; and the Court in the *Tripp* case recognized that there remained a question as to whether or not the undisputed facts were sufficient as a matter of law for the granting of a summary judgment in favor of the plaintiff.

Consequently, Southwest would submit that the rationale of *Gillespie, Demelle* and *Tripp, supra,* are inappropriate in the case at bar, and each of them are distinguishable and none on point.

Southwest maintains that the agreement between counsel for Southwest and Westinghouse that there existed no genuine issue as to any material facts, is inoperative on the theory and rationale of *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917); *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967); and *Brawner v. Pearl Assurance Co.*, 267 F.2d 45 (9th Cir. 1958) heretofore cited by Southwest (See Appellant's Opening Brief, pp. 18-20).

Additionally, Southwest urges the theory adopted by the Court in the case of *Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp.*, 283 F.Supp. 184 (S.D.N.Y. 1968) where the Court held that there were issues of fact sufficient to preclude summary judgment where the parties disagreed as to whether contracts existed, and where the transactions were fragmented into numerous cables, letters and conversations, the cables containing vernacular of the trade and abbreviated phraseology. The Court stated the following with regard to the appropriateness of granting a summary judgment in such a case:

> *Although a substantial part of the evidence is documentary, the parties dispute the inferences to be drawn therefrom.* The inferences to be drawn from such evidence 'must be viewed in the light most favorable to the party opposing the motion.' * * *
>
> *This is not a case involving the construction or interpretation of 'clear and unambiguous' language of documentary exhibits.* * * * In fact, the exact opposite is exemplified by this particular case: the transactions are fragmented into numerous cables, letters and conversations; the cables themselves are couched in the vernacular of the trade and are worded in abbreviated phraseology; the parties disagree about the relevancy of some of the documents; and there is a genuine issue as to the meaning and significance of almost all of them. * * * (283 F.Supp. 187-88) (Citations omitted) (Emphasis added)

Consequently, it is respectfully submitted that the agreement of counsel is a nullity and inoperative, and since Westinghouse renewed its motion for summary judgment and, as the moving

party, has totally failed in its heavy burden to establish that there were no genuine issues as to any material facts, the Lower Court erred in granting a partial summary judgment to Westinghouse when the Lower Court did not find that there were no genuine issues as to any material facts.

I. (B) When There Is a Controversy as to the Inferences Which Are Drawn from the Historic Facts, the Lower Court Cannot Grant a Summary Judgment.

At this point Southwest feels it is imperative to inform the Court that Westinghouse has wholly failed to respond to or contradict Southwest's arguments and authorities set forth at pp. 21-26 of Southwest's Opening Brief.[1] Since Westinghouse failed to respond to Southwest's argument as set forth in Question No. I B, the only conclusion that can be reached is that Southwest's theory and authorities are correct and that Westinghouse has admitted that the entry of partial summary judgment by the lower court was in error.

The rationale of Southwest's argument as presented in Question I B is that in determining whether or not there are genuine issues as to material facts, not only must the historic facts be free from controversy, but there must also be no controversy as to the inferences which may be drawn from the historic facts. Additionally, the non-moving party is entitled to all favorable inferences which can be drawn from the historic facts, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the moving party prior to the granting of a

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1. The only statement which Southwest can find with regard to this portion of Appellee's Brief is on p. 31 thereof wherein it states: "Much of Southwest's argument is based on the proposition that agreements of counsel on questions of *law* are not necessarily binding on the court (see, *e.g.*, Appellant's Brief, pp. 17, 25)." (Emphasis supplied)

summary judgment. The rationale of this theory is set forth in a multitude of cases, among which are: *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965); *Cram v. Sun Insurance Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967); *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966); and *Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp.,* 283 F.Supp. 184 (S.D.N.Y. 1968).

In the case of *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965), the Court stated this theory as follows:

> *. . . Not merely must the historic facts be free of controversy, but also there must be no controversy as to the inferences which may be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.* (Emphasis added) (354 F.2d at 216)

In the case at bar there may be no dispute as to the historic documents which comprise the contract documents between Southwest and Westinghouse, but there is a definite and genuine dispute as to the inferences which may be drawn from them. The Court will note, counsel for Southwest and Westinghouse, after agreeing upon the historic documents, then proceeded to argue to the lower court the various inferences which were drawn from the historic facts and documents. The inferences which were drawn from the historic documents by respective counsel were in direct controversy and conflict. (See Argument of Counsel, App. pp. 77-86).

Therefore, it is respectfully submitted that Westinghouse has admitted that the Lower Court was in error in granting its partial summary judgment when Westinghouse totally failed to respond to or contradict the theory and authorities cited by Southwest in its argument.

I. (C) Where the Conduct of the Parties Recognizes the Existence of a Contract but the Documents of the Parties Do Not Establish a Contract, Then There Is a Contract Between the Parties Which Consists of Those Terms on Which the Documents of the Parties Agree Together with Any Supplemental Provisions Supplied by the UCC.

Westinghouse has virtually ignored Question No. II A presented by Southwest, and merely relied upon the following statement: "Southwest's argument on the 'meeting of the minds' issue as it appears in Appellant's Brief, pp. 26-35 is not too clear to Westinghouse." (Appellee's Brief, p. 32). Additionally, Westinghouse states that Southwest has not shown that the Lower Court's Opinion was clearly erroneous and then attempts to rely upon the Lower Court's Opinion.

The reliance by Westinghouse on the Lower Court's Opinion is not well founded. The case of *Castner v. First National Bank of Anchorage,* 278 F.2d 376 (9th Cir. 1960) involved an appeal from the granting of a summary judgment, and the Court of Appeals stated:

> However, we are not concerned with the reasons given by the district judge for his action but rather center our inquiry upon a determination of whether the judgment he entered was right. * * * To do this, we must now proceed to examine the record as it was presented. (278 F.2d 381) (Citations omitted)

Consequently, Southwest has no obligation at this time to review the reasoning of the Lower Court, nor show that the Lower Court's ruling was clearly erroneous as Rule 52(a) of the Federal Rules of Civil Procedure is not appropriate.

Southwest submits that one of the reasons why Westinghouse did not come to grips with Southwest's argument as set forth in Question No. II A was because it did not want to understand this argument as it is one of the major arguments proposed by Southwest and presents the applicable ruling which should result if § 2-207 of the *Uniform Commercial Code* had been properly applied by the Lower Court.

On the back page of Ex. Y-2 (App. pp. 12-13), the letter sent by Westinghouse to Rust Engineering on May 18, 1960, offering to sell to Southwest a 25,000 kw. turbine generator unit, it is stated in inconspicuously small type:

> ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On July 6, 1960, Southwest by its purchase order signed by James A. Staley (Ex. 2-A, App. p. 26) responded to Westinghouse's offer to sell a 25,000 kw. turbine generator unit; however, on the face of Southwest's purchase order, it is stated in bold type:

> IMPORTANT INSTRUCTIONS
> * * *
> Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

Southwest respectfully submits that these provisions are in irreconcilable conflict and that as a result thereof there could never be a meeting of the minds of the contracting parties, Southwest and Westinghouse.

The case of *Euclid Engineering Corporation v. Illinois Power Company,* 78 Ill.App.2d 235, 223 N.E.2d 409 (1967), held that the Uniform Commercial Code still required an agreement or meeting of minds between the negotiating parties before there could be a contract. Since the contracting documents between Southwest and Westinghouse are in irreconcilable conflict, how could there be a meeting of the minds?

§ 2-207(3) of the *Uniform Commercial Code* provides that where the minds of the contracting parties did not meet on all the essential terms and conditions, as set forth in their respective documents, then in such a case there is still a contract between

the contracting parties if conduct by both parties recognizes the existence of a contract. § 2-207(3) provides: The contract consists of those terms on which the documents of the parties agree and any other terms supplemented by the *UCC*.

Additionally, Comment 7 of the official Comments guides the Court as to how Sub-§ (3) of § 2-207 is to operate. It states:

> In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Therefore, it is submitted that the contracting documents between the parties did not constitute a contract due to the irreconcilable conflict in the documents themselves. However, neither party can deny that a contract did not exist between them because the turbine generator unit was shipped by Westinghouse and substantially paid for by Southwest prior to the arising of any dispute. Consequently, § 2-207(3) of the *UCC* should apply and the contract between the parties consists of only those terms upon which the writings of the parties agree and any missing terms or provisions would be supplemented by the other provisions of the *UCC*.

I. (D) The Lower Court Erred in Determining That Paragraphs (2) and (12) of Southwest's Purchase Order Dated July 6, 1960, Were "Additional" Terms.

In connection with Question No. II C, it is again apparent that Westinghouse is relying entirely upon their statement that the argument of Southwest "is not too clear to Westinghouse" and their misplaced reliance on the Court's Opinion. Westinghouse has made no attempt whatsoever to rebut the authority cited by Southwest.

Southwest submits that the Lower Court incorrectly determined (assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse) that ¶'s (2) and (12) of

Southwest's purchase order (Ex. 2-A, App. p. 26) contained *additional* terms as opposed to *different* terms under § 2-207 of the *UCC*.

Since the authors of the *UCC* made a deliberate distinction between the terms "terms additional to" and "different from" in § 2-207(1), they must have had a specific reason for so doing. § 2-207(1), when read in conjunction with § 2-207(2), further accentuates this distinction in terms as § 2-207(2) contains only the words "additional terms" and does not contain the words "different from".

This distinction was appropriately noted by Mr. Duesenberg and Prof. King in 3 Bender's *Uniform Commercial Code Service,* § 3-301(1), p. 3-28, wherein they discus and define "different" and "additional" terms and how this distinction must operate. (See Appellant's Opening Brief, p. 34).

Consequently, it is respectfully submitted that the Lower Court erred in its determination that ¶'s (2) and (12) of Southwest's purchase order were "additional" terms and not "different" terms.

I. (E) Genuine Issues as to Material Facts Were Presented as to Which Contract Existed and What Terms Were Contained in the Contract Between Southwest and Westinghouse.

Westinghouse, on p. 36 of its Brief, states that under Pennsylvania law the question of what the contract is, is one of law for the Court to determine when the facts are undisputed, and claims that Southwest does not challenge this proposition of law. Westinghouse is severely mistaken in its contention that Southwest does not contend that this proposition of law is incorrect or that the cases cited by Westinghouse are applicable to this case. Southwest has consistently contended that where each of the parties have claimed that a different document was the contract, then a question of fact arose as to which document or documents comprise the contract between the parties.

Westinghouse has cited the cases of *Reitmyer v. Coxe Bros. & Co.,* 107 A.739 (Pa. 1919); *In re Home Protection Building & Loan Ass'n,* 17 A.2d 755 (Sup. Ct. Pa. 1941), and *Buff v. Fetterolf,* 215 A.2d 327 (Sup. Ct. Pa. 1965) for the proposition

that what the contract was is one of law for the Court to determine when the facts are undisputed. *The cases cited by Westinghouse are inappropriate to the question at issue as they deal with implied-in-fact contracts and not with express contracts.*

It is readily apparent that, and we are sure Westinghouse must admit that, a contract was in existence between the parties. However, Southwest is contending that the terms of the contract are derived from the terms of its purchase order (Ex. 2-A, App. p. 26), and Westinghouse is contending that the terms of the contract are derived from its letter to Rust of May 18, 1960 (Ex. Y-2, App. p. 12). Therefore, it is readily apparent that the question is upon which claimed contract did the minds of the parties meet? Did they meet on the claimed contract of Westinghouse? What is the fact? Was it the contract that Southwest claims was entered into, or was it the contract Westinghouse claims the parties entered into?

The Supreme Court of Delaware, applying Pennsylvania law, held in *Pennsylvania Company v. Wilmington Trust Company,* 166 A.2d 726 (Del. 1960) that the intention of the parties in the formation of a contract is a matter to be decided by the trier of fact.

The Court of Appeals for the Third Circuit, in the case of *Melo-Sonics Corporation v. Cropp,* 342 F.2d 856 (3rd Cir. 1965) held that: "Whether this exchange of telegrams and the correspondence previously agreed upon created a contract is a question of intention of the parties and this question of intention is to be a matter for the trier of fact." (342 F.2d 859)

In the case of *O'Neill v. Atlas Automobile Finance Corporation,* 11 A.2d 782 (Sup. Ct. Pa. 1940) the plaintiff brought an action in assumpsit to recover a sum allegedly due for professional services against the defendant, and the defendant counterclaimed. The Court stated that the following items of fact arose: "(a) Did defendant make these contracts, and if so what were their terms? (b) Did plaintiff perform the work called for by them? . . . Each issue was necessarily one of fact to be determined by the jury." (11 A.2d 783). The Court in its holding stated:

> It is well settled that the terms and construction of such a contract are for the jury where, as here, its terms are disputed . . . The jury evidently accepted plaintiffs' version of the terms of their contract and the nature of their duties under it. (11 A.2d 785) (Citations omitted)

Other Pennsylvania cases holding that where the terms of a contract are disputed a jury question is presented are *City of Philadelphia v. Stewart,* 51 A. 348 (Pa. 1902); *Bastian v. Marienville Glass Co.,* 126 A. 798 (Pa. 1924); and *Dougherty v. Proctor & Schwartz,* 176 A. 439 (Pa. 1935).

In the case of *Geistert v. Scheffler,* 25 N.W.2d 241 (Mich. 1946), the Court stated that where each of the parties claimed an express contract, the sole question of fact was which was the correct contract.

In the case of *Clifton v. Village of Constantine,* 293 N.W. 658 (Mich. 1940), the Court stated:

> 'Where an express contract is entered into between parties but they differ as to the terms thereof, and there is evidence tending to support the claim of each of them, it is for the jury to determine what the terms of the contract were, . . .'
> (Citation omitted)

Westinghouse, on p. 36 of its Brief, contends that Southwest:

> . . . makes no suggestion that what it now contends to be a factual finding by the Court is unsupported by the stipulated evidence nor does it contend that it is 'clearly erroneous' within the meaning of Rule 52(a), Federal Rules of Civil Procedure.

This is an incorrect statement of Southwest's position, as Southwest has continually contended that not only is there a question of fact as to which, if any, of the historic documents the parties agreed upon, but there are also questions of fact as to the inferences which were drawn from the historic documents. In addition, Rule 52(a), Federal Rules of Civil Procedure is inappropriate because, here we are dealing with a motion for

summary judgment and not an action tried to the Court without a jury. The judgment entered by the Lower Court was a judgment entered pursuant to Rule 56, and not pursuant to Rule 52(a) and as such the "clearly erroneous" rule would have no applicability. Additionally the testimony derived from the depositions of John Sherman and John J. Rice establish that even Westinghouse did not consider that they had a contract with Southwest until Southwest tendered to Westinghouse its formal purchase order. (See Depo. of Sherman, p. 11; Depo. of Rice, pp. 11-12).

John W. Ruyak, a buyer for Rust, testified at his deposition that the letter of intent was not an acceptance of the vendor's proposal, as it is preliminary to actually getting down into the finer language of the contract. (See Depo. of Ruyak, 8/4/67, p. 16).

Consequently, the various representatives of Westinghouse and Rust agreed the letter of intent was not an acceptance of the contract.

Additionally, Westinghouse consistently alleged that Southwest purchased and Westinghouse sold the turbine generator to Southwest on July 6, 1960 in its various answer and counterclaim (See TR pp. 14, 17, 671, 675, 746 and 750). Westinghouse, itself, under oath stated that the sales documents between Westinghouse and Southwest consisted of the bid invitation issued by Rust on May 3, 1960; the proposal dated May 12, 1960, which was transmitted by letter dated May 18, 1960, to Rust; the letter of intent which was issued by Rust on June 6, 1960; *and a final purchase order which was issued on July 6, 1960.* (See answers to Interrogatory No. 1 submitted by Westinghouse, TR 367-68). At no time prior to August 7, 1967, did Westinghouse consider the Copy 25 acknowledgment, dated June 13, 1960, to be of any consequence between the parties in the purchase and sale of the steam turbine generator unit, for it was not even mentioned in answer to Interrogatory No. 1 (TR 367-68).

Therefore, although Southwest is not required to do so, it is respectfully submitted that the Trial Court was clearly errone-

ous in its findings that a contract came into being on June 6, 1960.

Consequently, it is respectfully submitted that there existed genuine issues as to material facts which prevented the granting by the Lower Court of a summary judgment because the finder of fact must determine which contract existed between Southwest and Westinghouse and what terms were contained therein.

II. (A) The Issue of Unconscionability of the Exculpatory Westinghouse Warranty Was Timely Raised and Is Properly Presented for Review.

Westinghouse, in its second question presented, contends that Southwest's argument that the exculpatory warranty of Westinghouse is unconscionable is untimely. Westinghouse attempts to mislead the Court into believing that counsel for Southwest is for the first time inserting facts in its Brief which are not supported by the record. (See Appellant's Brief, p. 39). Southwest has reviewed the Transcript of Record and indeed finds that the document to which Southwest referred is not included therein. However, counsel for Westinghouse did in fact receive the memorandum to which Southwest has referred in its Opening Brief on p. 36. This document is an 11-page memorandum entitled "Supplemental Memorandum in Opposition to Motion for Summary Judgment", and the portion which Southwest has heretofore included in its Brief is found on p. 9 thereof. In addition, the certificate of delivery on p. 11 thereof states:

> Copy of the foregoing delivered this 11th day of August, at 8:15 O'Clock A.M. to:
>
> John J. Flynn
> LEWIS ROCA BEAUCHAMP & LINTON
> 114 West Adams Street
> Phoenix, Arizona 85003
> Attorneys for Defendant
>
> /s/ R W Perry
> Roger W. Perry

Also, counsel for Westinghouse was fully aware that the issue of unconscionability of the exculpatory warranty of Westinghouse was in issue, for on the same date when counsel for Westinghouse received the Memorandum above mentioned, they argued at considerable length to the Court that the exculpatory warranty of Westinghouse was not unconscionable. (Appellant's Opening Brief, pp. 36-37).

Westinghouse, on p. 40 of its Brief, goes to some length in an attempt to argue the theory that a party may not raise on appeal issues and theories which he did not present or litigate in a trial on the merits below. The cases cited by Westinghouse are inappropriate and not on point in the situation at bar, as all the cited cases involved actual trials on the merits, which had been commenced and terminated by judgment, with the exception of one which was dismissed as being premature.

The *Eason v. Dickson,* 390 F.2d 585 (9th Cir. 1968) case involved an action under the Civil Rights Act by a state prisoner against the chairman of State Adult Authority Board and the administrator of Youth and Correction Agency of the State for damages and injunctive relief. The petitioner requested that a 3-judge district court be convened to hear the matter, in view of the prayer for injunctive relief. The lower court refused to convene the 3-judge district court and granted summary judgment in favor of the defendants. The Appellate Court held that where the state prisoner's contention, that the State Statutes governing parole revocation were unconstitutional as they did not provide for a court hearing, had been overruled on several occasions, the prisoner did not present a substantial constitutional question. Additionally, the Court held that the Lower Court's order denying convention of a 3-judge court was not a final decision from which an appeal would lie, as it did not terminate the litigation on the merits. Consequently, the prisoner's notice of appeal was premature.

The other cases cited by Westinghouse: *Roberson v. United States,* 382 F.2d 714 (9th Cir. 1967); *Pacific Queen Fisheries v. Symes,* 307 F.2d 700 (9th Cir. 1962); *Inman-Poulson Lumber*

Co. v. Commissioner of Int. Revenue, 219 F.2d 159 (9th Cir. 1955); *United States v. Waechter,* 195 F.2d 963 (9th Cir. 1952); and *Wilson v. Byron Jackson Co.*, 93 F.2d 572 (9th Cir. 1937), are wholly inapplicable to the situation at bar, as all of these cases involved an appeal following a full trial on the merits and not the granting of a motion for summary judgment.

Westinghouse also cites the cases of *Cleary v. Indiana Beach, Inc.,* 275 F.2d 543 (7th Cir. 1960); *Royal Indem. Co. v. Olmstead,* 193 F.2d 451 (9th Cir. 1951); and the authorities of 3 Barron & Holtzoff/Wright, *Federal Practice and Procedure,* § 1304 (1958); and 6A Moore, *Federal Practice,* ¶ 59.07 Rev. ed. 1966) for the proposition that a party may not raise on appeal issues and theories which he did not present or litigate below after judgment in the court below.

In the *Cleary v. Indiana Beach, Inc.* case, there was an actual trial to a jury on the merits, and subsequently, the plaintiff was denied the right to amend his complaint to allege that defendant had been guilty of wilfull and wanton conduct. In *Royal Indem. Co. v. Olmstead,* the Court merely held that it was within the discretion of the Court to refuse the appellant permission to amend its answer after summary judgment had been entered. The cited authorities of 3 Barron & Holtzoff/Wright, *Federal Practice and Procedure,* § 1304 (1958) and 6A Moore, *Federal Practice,* ¶ 59.07 (Rev. ed. 1966) are wholly inapplicable to the case at bar as the sections cited involve grounds for granting a new trial. In the case at bar, Southwest is not seeking a new trial, but the reversal of a motion for summary judgment.

Westinghouse cites the case of *Albrecht v. Herald Co.,* 367 F.2d 517 (8th Cir. 1966) for the proposition that when the shift of theories comes before judgment, but after the case has been presented on another theory, it comes too late. In the *Albrecht* case, a jury verdict was involved and the Court held it was too late after conclusion of the evidence for plaintiff to change its theories, and as such, this case is wholly inapplicable.

Consequently, the cases and authorities cited by Westinghouse are wholly inapplicable and distinguishable as they do not deal

with situations similar to the situation at bar. It is respectfully submitted that the issue of unconscionability of the exculpatory warranty clause of Westinghouse was timely raised by the parties and is properly here for review.

II. (B) When the Exclusive Remedy of Repair or Replacement Fails, All the Ordinary Remedies Provided by the UCC Become Available to the Aggrieved Party.

Westinghouse, on p. 41 of its Brief, has stated that the question presented by Southwest contains factual assumptions which contradict the record. However, Southwest has specifically shown that the unconscionable exculpatory warranty of Westinghouse was not brought to the attention of Southwest. (See Appellant's Opening Brief, pp. 30-32).

Westinghouse cannot now merely rely upon the Lower Court's Opinion for its position in opposition to Southwest's argument. See *Castner v. First National Bank of Anchorage,* 278 F.2d 376 (9th Cir. 1960).

Westinghouse goes on to state, at p. 42 of its Brief, that Southwest has no cases supporting its proposition and obviously could not have such authorities since § 2-719(3) of the *UCC* expressly authorizes the exclusion of consequential damages. However, what Westinghouse has failed to point out is that § 2-719(2) specifically provides that where the exclusive or limited remedy fails in its essential purpose then remedy may be had by the injured party as provided in the *UCC.* § 2-719(2) specifically qualifies § 2-719(3), which Westinghouse relies upon entirely, by stating: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." Westinghouse does not seriously resist this argument of Southwest, because it has cited no cases which are contrary to the Court.

The cases cited by Southwest and re-cited by Westinghouse in its Brief at p. 43 all stand for the proposition that if the exclusive remedy of repair fails, all of the *UCC* remedies become available. Westinghouse has not effectively distinguished

any of the cases cited by Southwest, other than to state that none of these cases involved a claim of unconscionability. However, the basis for each of the Court's holdings in all of the cases cited by Southwest were grounded upon an unconscionable theory.

The question squarely presented to the Court is this: Where Westinghouse seeks to avoid liability for damages under a contractual provision limiting and excluding such liability, but also requiring Westinghouse to repair or replace equipment which is defective, will the failure of Westinghouse to accomplish the repair, or negligence or undue delay in making such repairs, render it liable for damages, notwithstanding the express limitation of liability?

There are a number of cases involving express warranties by which the seller of a particular item had included a provision for repair or replacement of defective parts disclosed within a certain period of time in order to make the item in question apply with the warranted performance. The cases have consistently held that where the seller has attempted to correct the defect but has been unable to do so, or where the seller has taken an unreasonable time to repair or replace such defective item, recovery for damages will be allowed.

In *Westinghouse Electric & Mfg. Co. v. Glencoe Cotton Mills,* 106 S.C. 133, 90 S.E. 526 (1916), Westinghouse sought to recover the purchase price of six electric motors sold to the defendant for use in its cotton gin. The contract contained the following warranty:

> 'The company guarantees that the apparatus herein specified will generate or utilize electrical energy to their rated capacities without undue heating and will do their work in a successful manner, provided they are kept in proper condition and operated under normal conditions, and the purchaser supplies competent supervision for their operation. *The company agrees to correct, at its own expense, any defects of labor or material in said apparatus which may develop under normal and proper use within thirty days after the starting thereof,* provided the purchaser gives the

> company immediate written notice of such defects, *and the correction of such defects by the company shall constitute a fulfillment of its obligation to the purchaser hereunder.'*
> (90 S.E. 526)

One of the motors was found to be defective shortly after installation and Westinghouse was promptly notified. Westinghouse made repeated efforts to correct the defect; but the cause of the trouble was not discovered until more than 2 years later. Pending the discovery and correction of the cause of the trouble, defendant's operations were subjected to frequent interruptions, and defendant incurred expense in getting another motor to run the spinning frames, and in attempting to ascertain the cause of the trouble. The Court, acknowledging the principle that Westinghouse had a right to limit its warranty and that the rights of the parties are to be determined under the express warranty contained in the contract, concluded that Westinghouse would be liable for its failure to correct any defects appearing within the thirty day period after the lapse of a reasonable time in which to do so.

> It follows that plaintiff is not liable for damages resulting from any defects that did not develop within 30 days after starting to run the motors; but that it is liable for all damages that *naturally and proximately resulted from its failure to correct such defects after the lapse of a reaosnable time within which to do so,* after notice thereof given as required by the contract.
> (90 S.E. 527)

The holding in the *Glencoe* case is clear that where a seller fails to comply with the obligations contained in the warranty concerning repair and replacement, he will be held liable for damages which accrue to the purchaser as a direct and proximate consequence of his breach.

In the case of *Dieter v. Frick Co.,* 169 S.C. 480, 169 S.E. 297 (1933), the plaintiff purchased from the defendant refrigerating plant under a contract containing an express warranty and limitation of liability to the replacement of defective parts. The

warranty provided that "Frick Company is not to be liable for any losses, damages or delays caused by defects, except to furnish duplicate parts as provided herein; *its liability being expressly limited to furnishing duplicate parts.*" (169 S.E. 298) (Emphasis added). After installation of the equipment and during the specified time limit, certain parts proved defective and broke and the whole plant was stopped, and plaintiff's business, dependent on it, was at a stand-still. The defendant was notified of the defects but failed to furnish new parts until plaintiff paid an installment due on the note given for the purchase price, even though defective parts under the warranty were to be replaced free of charge. This refusal resulted in plaintiff's plant being shut down for a period of forty-six (46) days, which the Court determined to be an unreasonable length of time. Plaintiff instituted the action to recover damages based upon a breach of the express warranty contained in the contract. The defendant contended that, under the terms of the warranty, if it should fail or refuse to furnish duplicate parts, plaintiff's only remedy would be to sue for the value of the parts, and if it did furnish the duplicate parts, then under the contract it would not be liable for any damages, delays or losses. The court noted that the defendant denied liability on the contract, but was attempting to hold plaintiff to its strictest terms. The Court held that in the circumstances, the plaintiff was entitled to recover all of the damages which it suffered by reason of the refrigeration plant being shut down pending the receipt of duplicate parts.

More recent is the case of *Steele v. J. I. Case Company,* 197 Kan. 554, 419 P.2d 902 (1966), wherein the plaintiff-purchaser sought to recover in an action for breach of an express warranty relating to three combines purchased from the defendant-manufacturer ("Case") for the harvest of Kansas crops. From the outset, the machinery failed to operate properly, causing many delays and consequent loss of grain. Attempts by representatives of Case to repair the machinery were unsuccessful. The action was instituted to recover damages resulting from delays due to the alleged breach of the warranty. Generally, the warranty

provided defendant with the opportunity to remedy defects, or to furnish a new machine or refund the purchase price in the event the machine cannot be made to fulfill the warranty. Paragraph 5 of the contract specifically provided:

> 'The Company's liability for any breach of this warranty is limited to the return of cash and/or notes actually received by it on account of the purchase price of said product or part.' (419 P.2d 905).

The Court first treated the issue of whether Case complied with its warranty by supplying new combines for a subsequent harvest season:

> The seller of a piece of machinery would be wrong to suppose that he could fully fulfill a warranty, containing provisions similar to Paragraph 2(b) [repair, replacement], by first taking an inordinately long time in an effort to remedy the defect and then, failing in his attempt, by furnishing a substitute machine a year after special damages had accrued. We believe such is not the law.
> (419 P.2d 907)

With respect to the clause limiting liability of Case, the Court stated:

> . . . However, the question presented in *this* action is whether the limitation contained in Paragraph 5 precludes recovery of consequential damages of the character shown here, damages which, we hasten to add, we think must be within the contemplation of every person dealing in harvesting equipment who is familiar with the exacting demands of a Kansas harvest.
> (419 P.2d 908) (Emphasis supplied)

The Court concluded in its holding that, "under the conditions outlined, . . . it would be unfair and inequitable to give effect to the provisions of limitation encompassed in the warranty." (419 P.2d 910). The holding, therefore, is one of "unconscionability."

For other cases allowing recovery when the exclusive remedy of repair or replacement failed, see *Edenton-Mackeys Ferry Co.*

v. Fairbanks-Morse & Co., 201 N.C. 485, 160 S.E. 572 (1931); *Fairbanks, Morse & Co. v. Twin City Supply Co.,* 170 N.C. 315, 86 S.E. 1051 (1915); *Minneapolis-Moline Power Implement Co. v. Wright,* 233 Mo.App. 409, 122 S.W.2d 397 (Mo.Ct.App. 1938); *Mayfield v. George O. Richardson Machinery Co.,* 208 Mo.App. 206, 231 S.W. 288 (Mo.Ct.App. 1921); *Reitan v. Wilkinson,* 154 Okla. 163, 7 P.2d 486 (1932); *A. Baldwin Sales Co. v. Mitchell,* 174 La. 1098, 142 So. 700 (1932); and cases and authorities cited by Appellant in its Opening Brief, pp. 40-45.

The record is replete with evidence showing that Westinghouse failed to promptly repair the steam turbine generator, and when it did repair the generator it was done in a negligent manner. (See Summary of Depo. App. pp. 87-96; Appellant's Opening Brief, pp. 7-9).

Therefore, it is respectfully submitted that since Westinghouse negligently manufactured the steam turbine generator unit so that it failed to function and perform properly, and when Westinghouse undertook to repair the Unit, the repairs were negligently made and failed to remedy the defects as promised, Southwest is entitled to all the remedies provided by the *UCC* because Southwest has been deprived of a substantial value of its bargain.

II. (C) An Excessively High Price May Constitute an Unconscionable Contractual Provision Under the UCC.

Westinghouse on p. 43 of its Brief would lead the Court to believe that Southwest has cited no cases indicating that an excessively high price may constitute an unconscionable contractual provision. Apparently, Westinghouse has not read the case of *Ceneral Budget Corp. v. Sanchez*, 53 Misc.2d 620, 279 N.Y.Supp.2d 391 (1967) wherein the Court held that excessively high prices may constitute unconscionable contractual provisions. Other cases have also held that where a party was paying an amount in excess of the value of the goods or services they were to receive, the contract would not be enforced because

of its unconscionable features. See *American Home Improvement, Inc. v. MacIver,* 201 A.2d 886 (N.H. 1964); *Frostifresh Corporation v. Reynoso,* 281 N.Y.Supp.2d 964 (1967); *State by Lefkowitz v. ITM, Inc.,* 275 N.Y.Supp.2d 303 (1966).

Therefore, it is respectfully submitted that the contract as contended by Westinghouse may be unconscionable as a result of the alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

III. (A) Southwest Has Pleaded and Suffered Legally Sustainable Claims in Negligence and Strict Liability Allowing Recovery of Its Losses Under the Tort Measure of Damages.

The reply of Southwest to Westinghouse's argument contained in §'s III and V of Appellee's Brief is combined in one, as they are interrelated. This is necessitated because the thrust of Westinghouse's argument is that Southwest's negligence and strict liability counts must stand or fall on Westinghouse's position that "consequential" damages or "economic losses" are not recoverable. Reference to textbook law quickly refutes this contention by Westinghouse:

> Where an item of personal property which has been used to produce profits has been injured, taken, or destroyed by the tortious conduct of the defendant, counts—in appropriate cases—allow a recovery for those profits which were lost during the time reasonably needed to repair or to replace the item.
> (22 Am.Jur.2d, Damages, § 176, p. 250)

There is no mistaking that the law generally, and specifically in Arizona, holds that a tort feasor is liable for all those damages which are natural and proximate results of the defendant's tortious conduct. See *Gila Water Co. v. Gila Land & Cattle Co.,* 30 Ariz. 569, 249 P. 751 (1926). Westinghouse, by urging that damages sought herein are "consequential" is asking the Court for a preliminary decision on what is "the natural and proximate result" of the defendant's tortious conduct. This is obviously a question to be decided by the trier of fact.

In *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal.Rptr.17, 403 P.2d 145 (1965), the dicta of which is relied upon so heavily by Westinghouse in support of its liability argument, the Court sustained the plaintiff's recovery of what Westinghouse terms "consequential" damages, ostensibly based on the theory of breach of express warranty. It is significant to note, however, that the award was based on a *tort* rule of damages, *i.e.,* those losses resulting directly and naturally in the ordinary course of events from the failure to repair. It is indeed, therefore, an inconsistent line of reasoning which on one hand supports the result in *Seely, supra,* in awarding economic loss under a breach of warranty theory, but on the other hand disclaims the applicability of the *Seely* rule of damages as utilized in tort actions, *i.e.,* negligence and strict liability.

Therefore, since under the tort rule of damages the type of loss which Southwest seeks to recover is capable of being recovered, and since the tort rule of damages is to be applied in a tort action, Southwest now directs its attention to whether a tort actions lies, or more correctly, whether Westinghouse has established that a tort action does not lie.

III. (B) Negligence.

Though the parties contracted in Pennsylvania, the damage occurred at Snowflake, Arizona. Westinghouse has heretofore argued that Arizona law was applicable to the tort aspects of the case. (See TR 1109). To then urge, as does Westinghouse, that *Asphaltic Enterprises, Inc. v. Baldwin-Lima-Hamilton Corporation,* 39 F.R.D. 574 (E.D.Pa.1966) and *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc.,* 201 F.Supp. 191 (E.D. Ohio, 1961) are inapplicable, is without merit. Obviously, Pennsylvania law does not apply to damage caused *in Arizona* by the negligent manufacture and the negligent failure of Westinghouse to repair the turbine generator. Liability for failure to repair is generally predicated upon principles of negligence. In 5A Frumer & Friedman, *Personal Injury: Actions-Defenses-Damages* § 101, the authors state at pp. 414-15:

> A person undertaking to make repairs must exercise reasonable care in doing so, and, although elements of contract as well as tort may be involved, liability is generally predicated upon charge of negligence, and determined according to the same principles of liability applicable in negligence actions generally.

As in tort actions, generally, liability for negligent repair or negligent failure to repair is governed by the law of the place of injury. See 5A Frumer & Freidman, *Personal Injury: Actions-Defenses-Damages*, § 108, p. 430.

Westinghouse attempts to misconstrue Southwest's position by contending that Southwest would now urge a tort obligation independent of the contractual relationship between the parties. This contention is unwarranted for the negligence claim, as set forth in Count One of Appellant's Amended Complaint (TR 777-78) and as clearly set forth in Appellant's Opening Brief at pp. 50-52, is an *ex delicto* action arising out of a duty imposed by law as a result of the contractual relationship between the parties. (See: *McClure v. Johnson*, 50 Ariz. 76, 69 P.2d 573 (1937) quoted at length in Appellant's Opening Brief, at pp. 50-51). The critical point ignored by Westinghouse is that while the contract created the relationship between the parties, the duty is one imposed by law, and tort rules are applicable to its breach and the resultant damages.

It is therefore submitted that Southwest's Amended Complaint (TR 777-78) stated a claim in negligence upon which relief is properly recoverable, the claim being in tort is properly governed by Arizona law, and the only premise upon which Westinghouse opposes this inescapable conclusion is in and of itself totally in error and, therefore, must fall with the argument advanced therefrom.

III. (C) Strict Liability.

Since Westinghouse concedes that strict liability is now the law of Arizona, Southwest addresses itself to the reasons advanced by Westinghouse why strict liability is not applicable in this instance.

Westinghouse is urging that the damages sustained by Southwest in the case at bar are not of the type contemplated by the doctrine.

Westinghouse would have the Court believe that Southwest relies "solely" on the dissenting opinion in *Seely, supra.* This assumption, of course, ignores Southwest's explicit reliance on *Santor v. A. and M. Karagheurian*, 44 N.J. 52, 207 A.2d 305 (1965), as set forth in Appellant's Opening Brief, p. 66. This assumption further ignores the historical refusal of the courts to draw such arbitrary distinctions in applying tort remedies, *i.e.,* actions predicated on intentionally or negligently tortious conduct do not—insofar as there is or is not liability—hinge upon the quantity or quality of damage, economic status of the plaintiff, or *modus operandi* of the actor.

Westinghouse argues that strict liability should not be adopted for the reason that the plaintiff is a large corporation with sizeable assets. This argument is without merit.

The doctrine of strict liability must certainly apply equally in personal injury and property damage of the type sustained by Southwest. The doctrine has been applied in cases involving tortious conduct factually similar to that of Westinghouse. In *Santor, supra,* the damages awarded consisted of so-called economic loss. More importantly, the *tort* rule of damages most certainly constitutes the measuring stick. Under the tort rule of damages, economic loss in a case like this is recoverable. But, once establishing that a cause of action is pleaded in strict liability the amount of damages to be awarded is a matter for the trier of fact to determine.

It is therefore respectfully submitted: Southwest has properly pleaded legally sustainable claims in both negligence and strict liability; Southwest has suffered substantial damages as a result of Westinghouse's tortious wrongdoing; Southwest should be entitled to proceed to trial on the facts; and no legally cogent reason has been advanced by Westinghouse as to why Southwest is not entitled to recovery on its negligence and strict liability counts.

IV. (A) Whether Westinghouse Has Shown That It Was Entitled to a Judgment as a Matter of Law Was Timely Presented and Is Properly Presented for Review When the Lower Court Granted a Summary Judgment.

Westinghouse has continually, despite a record which supports a contrary result, argued that Southwest has had its day in court and that this matter has been fully and completely litigated by the parties hereto. However, the trial of this case had only been pending 3 days when Westinghouse promptly renewed its motion for summary judgment. Certainly, under no circumstances can it be found that Southwest has had its day in court, or that a trial to the Court took place, because Westinghouse was merely advancing its renewed motion for summary judgment.

In addition to a finding by the Court that no genuine issue as to a material fact exists, the Court must also find as a matter of law, that the moving party is entitled to a judgment before a summary judgment can be granted. Southwest submits Westinghouse must show, as the moving party, not only that a genuine issue material fact was missing but also that they are entitled to a judgment as a matter of law. This, Westinghouse has not done because they have not shown as a matter of law that Southwest was not entitled to recover any damages whatsoever.

Westinghouse now attempts to take the position that Southwest has untimely presented a question of law which would definitely render the granting of a summary judgment to Westinghouse in appropriate. Westinghouse would now have this Court find that since they posed an interrogatory to Southwest asking Southwest to itemize its consequential damages and further, since Southwest responded and characterized all of its damages as consequential, then all of the damages of Southwest must in fact be as a matter of law consequential damages. Additionally, they pounce on the statement of Southwest's prior counsel wherein he stated, "they [the damages] obviously are consequential and have been all along" (TP, 8/1/67, p.21; Appellee's Brief, p. 51).

As held in the case of *Daugaard v. Hawkeye Security Insurance Company,* 239 F.2d 351 (8th Cir. 1956), a concession by counsel in the Lower Court is not binding on an appeal.

Therefore, it is respectfully submitted that whether or not Westinghouse was entitled to a judgment as a matter of law is properly presented for review when the Lower Court granted a motion for summary judgment in favor of Westinghouse.

IV. (B) Westinghouse Has Not Shown That It Is Entitled to a Judgment as a Matter of Law Because Westinghouse Has Not Shown as a Matter of Law That Southwest Was Not Entitled to Recover Any Damages Whatsoever.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added).

Westinghouse, by its own mathematical computations, has shown that it is not entitled to a judgment as a matter of law. Westinghouse, on p. 54 of its brief, has conveniently provided mathematical computations wherein it was unable to account for the entire amount of damages sought by Southwest. Westinghouse stated:

> That leaves the claim for alleged repair which is a mere $2,300 out of a claim of approximately $2,530,000. *Assuming the repair expenses fell within the definition of incidental damages, no one would have considered trying this case for that claim, even if Southwest had then claimed those damages were incidental and even if the court would have relieved Southwest of all its avowals and stipulations that all its damages were consequential.* The repair claim was not in the minds of the parties at all. (Emphasis added).

The Court, in *Willred Company v. Westmoreland Metal Mfg. Co.,* 200 F.Supp. 59 (E.D.Pa. 1961) in deciding a case under the *UCC* as adopted in Pennsylvania, specifically held that the costs of having a defective product repaired, along with travel expenses

incurred by its repairmen in the field, were specifically recoverable as incidental damages under § 2-715 of the *UCC*. Also, § 2-719 of the *UCC* does not provide for the limitation or exclusion of incidental damages.

Even though prior counsel for Southwest may have been under the misapprehension that all the damages recoverable by Southwest were consequential damages, this will not bind Southwest on this appeal. (See *Daugaard v. Hawkeye Security Insurance Company*, 239 F.2d 351 (8th Cir. 1956)).

Therefore, it is respectfully submitted that a portion, if not all, of the damages which are sought by Southwest are incidental damages as defined in § 2-715 of the *UCC*. Consequently, Westinghouse has not shown that it was entitled to a judgment as a matter of law because it has failed to establish that Southwest was not entitled to recover any damages whatsoever.

V. A Seller Who Has Not Disclaimed Express and Implied Warranties Should Not Be Allowed to Negate the Availability of Recovery for the Breach of Such Express or Implied Warranties by Merely Restricting the Damages and Remedies of the Buyer Without Complying with the Precise Requirements for Disclaimer of Express and Implied Warranties as Provided for in the UCC.

Can a seller under the *UCC*, as was done by Westinghouse in the case at bar, grant to a buyer any number of express warranties and the implied warranties of fitness and merchantibility, and in a complete reversal in one sweeping clause, negate any recovery by buyer without first disclaiming and disclosing the availability of the buyer's remedies in the same and precise manner as is required to disclaim express and implied warranties under the *UCC*? If this be the purpose and intent of the *UCC*, then Southwest submits there is an irreconcilible conflict in the provisions of the Code itself, which are inconsistent in logic and reason.

Therefore, it is respectfully submitted that if the *UCC* is to hold, a seller must do certain things in a precise and specific manner to disclaim express warranties and implied warranties of fitness and

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMMY BIANEZ CHAVEZ, Appellant, v. LAWRENCE E. WILSON, WARDEN, Appellee.	)	No. 22697

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMMY BIANEZ CHAVEZ, Appellant, v. LAWRENCE E. WILSON, WARDEN, Appellee.	)	No. 22697

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Proceedings in State Courts

On November 17, 1964, in case number 291603, appellant entered a plea of guilty to the charge of violating Penal Code section 666 (petty theft with a prior petty theft conviction), a felony, and admitted an

additional prior felony conviction (TR 57).

On February 1, 1965, in case number 296774, appellant entered a plea of guilty to the charge of violating Health and Safety Code section 11500.5 (possession of narcotic other than marijuana for sale), a felony, with a prior narcotics conviction and an additional felony conviction being found true (TR 63).

On February 23, 1965, appellant was sentenced on each conviction to state prison for the term prescribed by law. The sentences were ordered to run concurrently (TR 41-42).

Appellant appealed from the aforementioned judgments and on August 9, 1966, the Court of Appeal, Second Appellate District, Division Two, affirmed the judgments of conviction in case number 10976. On October 7, 1966, a petition for habeas corpus relief was filed in the Marin Superior Court and was denied April 3, 1967, in case number 46665. Four days later, a similar petition was filed in the Court of Appeal, First Appellate District, Division One. On April 12, 1967, said petition was denied in case number 6340. Petition for habeas corpus relief was then filed in the California Supreme Court in case number 11060. On May 24, 1967, said petition was denied.

Proceedings in the Federal Courts

Appellant petitioned the United States District Court for a writ of habeas corpus on September 29, 1967 (TR 1). As in his petitions to the state courts, appellant made no attack on the conviction in case number 291603 (petty theft with a prior petty theft conviction). He did challenge, however, the validity of the conviction in case number 296774 (possession of narcotic other than marijuana for sale) on the following grounds: (1) that he was denied effective assistance of counsel; (2) that his plea of guilty was not freely and intelligently entered; (3) that the trial judge failed to apply his discretion to the issue of appellant's eligibility for commitment to the Narcotics Rehabilitation Center (TR 5, 12-23). In an order filed December 14, 1967, the District Court, deciding the cause on its merits, denied the petition (TR 139-145).

On March 8, 1968, petition for rehearing (TR 146-151) was denied (TR 152). Appellant's application for a certificate of probable cause and leave to appeal in forma pauperis was granted on this same day (TR 151-152). Notice of appeal was filed March 20, 1968 (TR 158).

APPELLANT'S CONTENTIONS

1. Appellant was denied effective assistance of counsel.

2. The trial court erred in accepting appellant's

plea of guilty.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant was not denied effective assistance of counsel.

II. Appellant's allegation that the trial judge did not adequately examine into his plea of guilty fails to state grounds for relief.

ARGUMENT

I

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In support of his contention that he was not adequately represented, appellant alleges (1) that although he "believed he had a good defense," trial counsel did not discuss the matter of defenses with him, and (2) that he was not apprised by counsel of the consequences of his guilty plea (AOB 8).

Before a court can grant federal habeas corpus relief in response to such a claim, a showing must be made that the representation was so ineffective that the proceeding was reduced to a farce or sham. Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967); Grove v. Wilson, 368 F.2d 414 (9th Cir. 1966). The record in this case precludes any such showing and affirmatively establishes that petitioner was ably represented.

The reporter's transcript of the preliminary

hearing (TR 69-101) demonstrates that appellant received competent representation by the public defender, who thoroughly cross-examined prosecution witnesses and explored all facets of the illegal sale and appellant's subsequent arrest. The vague and conclusory allegation that counsel failed to discuss with appellant possible defenses lacks sufficiency as a basis for granting relief. This barren allegation assumes the existence of some defense and requires this court to impute to counsel an act of incompetence in neglecting to present an unnamed defense or willfully bypassing the same. Although appellant claims he "believed" he had a defense, he fails to state what it was. The record establishes that appellant was ably represented and he has failed to present any facts supporting a different conclusion. See Barquera v. California, 374 F.2d 177 (1967).

The record also belies appellant's contention that he was not apprised by counsel of the consequences of his plea. At the time appellant withdrew his plea of not guilty and entered his plea of guilty, the following dialogue took place.

"THE COURT: Are you changing your plea freely and voluntarily without threat or fear to yourself or anyone else closely related to or associated with you?

"THE DEFENDANT: Yes, sir.

"THE COURT: Has anybody made you any promises of a lesser sentence, probation, reward, immunity or anything else in order to induce you to plead guilty?

"THE DEFENDANT: No, sir.

"THE COURT: Do you understand the matter of probation and sentence is to be determined solely by this Court?

"THE DEFENDANT: Yes.

"THE COURT: Are you pleading guilty because in truth and in fact you are guilty and for no other reason, is that correct?

"THE DEFENDANT: Yes." (TR 115-116)

This record clearly supports the finding that appellant knew that he could be sentenced to state prison for the crime he had committed and that he had been previously so advised by counsel. Faced with this record, appellant not only fails to explain the apparent conflict between the answers he gave at that time and his present contention, but affirmatively cites this portion of the record in support of his appeal (AOB 9).

Appellee submits that the allegations regarding the incompetency of counsel are refuted by the trial court record and, in any event, fail to state sufficient facts warranting relief.

II

APPELLANT'S ALLEGATION THAT THE TRIAL JUDGE DID NOT ADEQUATELY EXAMINE INTO HIS PLEA OF GUILTY FAILS TO STATE GROUNDS FOR RELIEF.

Appellant contends that the trial judge did not adequately examine him to determine whether his plea was knowingly and voluntarily entered. Rather than alleging that his plea was in fact involuntary and stating facts in support thereof, appellant confines his attack to the examination conducted by the trial judge and relies solely upon the state court record to support this proposition.

It is well settled that a habeas corpus petitioner must allege a recognizable ground for relief and support said allegation with specific facts. Schlette v. California, 284 F.2d 827 (9th Cir. 1960); Egan v. Teets, 251 F.2d 571 (9th Cir. 1958); Osborne v. Johnston, 120 F.2d 947 (9th Cir. 1941). The allegation that a trial judge in a state court failed to conduct an adequate examination at the time plea was entered, without an allegation that the plea was involuntary or entered without knowledge of the consequences, fails to state grounds for habeas corpus relief. See Waddy v. Heer, 383 F.2d 789 (6th Cir. 1967); Smith v. Hendrick, 260 F. Supp. 235 (E.D. Pa. 1966); see also Gilmore v. California, 364 F.2d 916 (9th Cir. 1966). The relevant inquiry is whether

appellant knowingly and voluntarily entered his plea of guilty, and without any allegation to the contrary, there is no basis upon which the district court could act. In any event, the above-quoted dialogue preceding the entry of plea clearly demonstrates, as the District Court so found, that the trial judge made a full and complete inquiry into appellant's desire to plead guilty and the consequences of said plea. Appellant's responses to the questions from the bench, which are not refuted or explained by the appellant, disclose that said plea was made knowingly and voluntarily. In addition to this thorough examination by the trial judge, appellant was represented throughout the proceedings and at the time of plea by counsel, was advised of his rights and the charges against him, and entered the plea on advice of counsel (TR 113-116). He fails to state any facts supporting the general allegation that his plea was involuntary.[1/]

Since appellant fails to state any facts supporting his contention and relies solely upon the state court

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1. It is significant to note that approximately three months prior to the entry of plea, appellant plead guilty in case number 291603 (TR 57). The examination conducted by the trial judge in that case was similar to the examination presently under attack (TR 106-108). Appellant does not challenge the validity of the plea entered in case number 291603, but would have this court set aside his subsequent plea solely on the basis of a substantially similar record.

record, the District Court correctly determined that the record refuted appellant's contention of an involuntary and unknowing guilty plea and properly denied the petition without an evidentiary hearing.

Appellant's contention that the District Court erred in failing to determine if his case was an exception to the McNally v. Hill, 293 U.S. 131 (1934) doctrine is frivolous since his petition was denied on the merits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus be affirmed.

DATED: May 3, 1968

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CERTIFICATE OF COUNSEL

I certify that in accordance with the prepera-tion of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: May 3, 1968

Timothy A. Reardon

TIMOTHY A. REARDON
Deputy Attorney General
of the State of California

No. 22,698

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MILLER BREWING COMPANY,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATUTE:

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No. 22,698

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MILLER BREWING COMPANY,
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ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq,*),[1] for enforcement of its order (R. 20, 3),[2]

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[1]Pertinent statutory provisions are reprinted *infra*, pp. 24-27, as Appendix A.

[2]References to the pleadings, Decision and Order of the Board, the Trial Examiner's Decision and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of

issued on July 20, 1967, against Miller Brewing Company (hereafter "the Company"). The Board's decision and order are reported at 166 NLRB No. 90. This Court has jurisdiction, the unfair labor practices having occurred in Azusa, California, where the Company operates a brewery. No issue of the Board's jurisdiction is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about plant rules which it unilaterally issued. The essentially undisputed evidence upon which the Board based its finding is summarized below.

Since 1950, the Union[3] has been the certified collective bargaining representative for certain categories of employees, mainly machinists, of brewing companies belonging to the California State Brewers Institute,[4] which later became the California Brewers Association (the Association) (R. 17; Tr. 10-14). The Association represented six employer-members for the purpose of collective bargaining on a multi-employer basis, and the Union was one of seven

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the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record," are designated "Tr." References to the General Counsel's exhibits are designated "G.C.Exh."; references to the Respondent's exhibits as "R.Exh."; References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3]International Association of Machinists and Aerospace Workers (AFL-CIO).

[4]See *California State Brewers Institute*, 90 NLRB 1747.

unions that bargained with the Association (*ibid.*). On May 1, 1966,[5] the Company acquired the Azusa, California, plant of the General Brewing Corporation, which was and continued to be a member of the Association (R. 17; Tr. 9-11). Thereafter, the Company also became the seventh member of the Association, and a signatory to the existing labor agreement between the Union and Association (R. 17; Tr. 6, 10, G.C. Exh. 2). The Company continued to employ and the Union continued to represent the 16 machinists who had worked for the Company's predecessor, General Brewing, in the Azusa plant (Tr. 10). From May 1 to October 24, the Company refurbished and remodeled the plant, and on the latter date it began actual operations (Tr. 9, 58).

Shortly before acquisition of the plant, the Company decided to issue certain plant rules governing employee conduct and during May and June a draft was prepared by the Company's Industrial Relations Department in Milwaukee, which was then circulated among the supervisors in the Azusa plant for comment. On September 14 it issued the rules by distributing them in booklet form through the various department heads to the employees. Upon being given the rules, the employees were asked to sign for them; although most did so, the machinists refused. The Union had no prior notice from the Company of the Company's plans or action in this regard (R. 17; Tr. 7, 18-19, 28-30, 53, 58-59, 62-63, 66-67, 84-85, 93).

The rules, which were similar but not identical to the rules maintained by the Company in its Milwaukee, Wisconsin, plant, differed

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[5] Unless otherwise specified, all dates refer to 1966.

in several respects from the plant rules issued by the predecessor company, General Brewing, for the Azusa plant in 1963. Thus, the new rules included prohibitions against theft, removal of Company records, gambling, insubordination, disclosure of confidential information, falsification of records, fighting and horseplay, which were not specifically contained in the 1963 rules, although at least some of these rules were understood by the employees to be in effect. Distinct changes, however, were made in the regulations governing, *inter alia,* overtime, soliciting of funds, gambling and leaving the department without permission. Moreover, the new rules introduced a rigid system of discipline for infractions not found in the old rules, including immediate discharge for violation of the rules termed "major rules" and, successively, warning, layoff and discharge for violation of the rules called "general rules" (R. 18; Tr. 36-50, 54-56, 58-59, 67, 81-86, 88-89, G.C. Exh. 4, R. Exh. 5).[6]

Following issuance of the rules, the Union's business representative, on October 7, telephoned the Company Plant Manager and asked him to discuss and negotiate the rules. The Manager replied that he had been advised by the home office that he was not obliged to do so, and consequently he would not talk about them. On October 10, the Union sent the Company a letter, in which it complained about the Company's "unilateral" promulgation of the rules, and stated that if the rules were not rescinded and the Union thereafter given an opportunity to bargain about them, it would file an unfair labor practice charge. Although the Company received the

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[6] Also prescribed in the same booklet was a series of "safety" rules, violation of which could lead to discipline as well.

letter the next day, it never responded to it (R. 17; Tr. 19-21, 25-26, 63-64, G.C. Exh. 5). The Union filed the instant charges on October 26, 1966 (R. 3).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the promulgation and content of the plant rules (R. 19, 30-31).

The Board ordered the Company to cease and desist from the unfair labor practice found and from in any like or similar manner interfering with, restraining or coercing employees in the exercise of their bargaining rights (R. 20, 31). Affirmatively, the order requires the Company to negotiate and discuss the promulgation and content of plant rules with the Union on request, and to post appropriate notices (R. 20-21, 31).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION, UPON REQUEST, ABOUT ITS PLANT RULES

A. The Company was obligated to bargain with the Union about plant rules

Section 8(d) of the Act, which defines the employer's duty to bargain imposed by Section 8(a)(5), requires the employer "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The employer's statutory duty to bargain does not end when an agreement is reached, but is a continuing one, involving "day-to-day adjustments in the contract and other working rules [and] resolution of new problems not covered by existing agreements . . . ." *Conley v. Gibson*, 355 U.S. 41, 46; compare *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 343 (C.A. 9). Bargaining about any subject encompassed within the statutory definition of "wages, hours and other terms and conditions of employment" is mandatory, *N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342, 348-349, and consequently an outright refusal to bargain, on request, about such a subject, or unilateral action by an employer with regard to such a matter, is a violation of Section 8(a)(5). *N.L.R.B. v. Katz*, 369 U.S. 736, 742-743. There can be no question, and the Company did not raise any before the Board, that plant rules, regulating the day-to-day behavior of employees at their work and imposing discipline for their violation, plainly involve working conditions and are, therefore, a required subject of bargaining. *Lloyd A. Fry Roofing Co.*

v. N.L.R.B., 216 F.2d 273, 274, 276 (C.A. 9); *N.L.R.B. v. Tower Hosiery Mills*, 180 F.2d 701, 703 (C.A. 4), cert. denied, 340 U.S. 811; *N.L.R.B. v. Gulf Power Company*, 384 F.2d 822, 825 (C.A. 5); *Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1304, enforced in relevant part, 341 F.2d 1020 (C.A. 8). But see *N.L.R.B. v. Hilton Mobile Homes*, 387 F.2d 7, 12 (C.A. 8). Accordingly, the Company's unilateral promulgation of plant rules and its subsequent refusal to discuss those rules with the Union was violative of Section 8(a)(5) unless justified on the bases set forth in the Company's affirmative defenses. We show below that each of its defenses is without merit.

B. The new rules substantially changed conditions of employment and were not a mere codification of existing rules

As shown *supra*, pp. 3-4, the new rules introduced prohibitions not mentioned in the 1963 rules issued by the predecessor company, General Brewing, although some were generally understood by the employees to be in effect. Many of the new rules, however, had not, so far as the evidence shows, previously been in force. Thus, certain forms of gambling such as card-playing and large football pools were restricted, although they had apparently been tolerated in the past (Tr. 33, 39, 86). Collections among employees for worthy causes were limited (Tr. 85). The right enjoyed under General Brewing to refuse to work overtime was taken away, even though the collective bargaining agreement arguably protects such a right (R. 18; Tr. 44, G.C. Exh. 3, p. 5). A new and rigid system of discipline for violations of the rules, the scope of which had not existed under the old system, was imposed (R. 18; Tr. 41-42, 48-49, 54-55). More-

over. General Rule 19 asserted the Company's right to establish "any other rules . . . from time to time" it wished (G.C. Exh. 4).

These facts, we submit, make it clear that the new rules were not, as the Company urges, just a restatement of existing regulations but represented a substantial departure from prevailing practice. The Company conceded as much at the hearing, for its own witness, Manager Lewis, stated in effect that the rules were not patterned after General Brewing's rules, but were taken basically from the plant rules in effect in its Milwaukee plant and drafted by its industrial relations department in Milwaukee (Tr. 58-59, 67). Therefore, as the Board pointed out (R. 30-31), while the mere posting of *existing* rules is not bargainable, *Mason & Hughes, Inc.,* 86 NLRB 848, 850, the promulgation, as here, of *new and different* rules is bargainable as to both substance and merits. See cases *supra,* pp. 6-7.

Furthermore, because of the haphazard way in which General Brewing had issued its rules in the past (Tr. 81-84), and the uncertainty as to the scope of the new rules (Tr. 85-86), bargaining was required to ascertain the precise nature and extent of the employees' present duties and responsibilities under the rules.[7] The Company's statement at the hearing that it was willing to discuss the

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[7]Compare *N.L.R.B. v. Katz, supra,* 369 U.S. at 746-747:

> Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer had already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

meaning and application, but not content, of its rules (Tr. 25-26), ignores the fact that it flatly refused to enter into any discussion of any kind with the Union about the rules. In any event, as shown, it was obligated to bargain in both of these respects.

There is no substance to the Company's claim that changes in plant rules, that have not been bargained for, are violative of the Act only when they stem from improper motives. An employer's bargaining obligation, once established, is independent of his obligations under other sections of the Act not to make changes for anti-union reasons, and it exists even though the employer acts in good faith, *N.L.R.B. v. Katz, supra,* 369 U.S. at 742-743, or under a good faith but erroneous view of the law, *N.L.R.B. v. Burnett Construction Company,* 350 F.2d 57, 60 (C.A. 10). Consequently, the Company's subjective motive here in issuing its plant rules is irrelevant, since the facts show a total refusal to bargain about the rules. *N.L.R.B. v. Tom Joyce Floors, Inc.,* 353 F.2d 768, 772 (C.A. 9).

C. The Union properly requested negotiations with the Company rather than the Association

As previously noted, the plant rules in question were prepared by the Company and issued by it through its department heads to its employees. When the Union asked the Company's Plant Manager to bargain about the rules, he refused to do so on the ground that the home office had advised him that he was not obligated to discuss them. At no time did he or any other representative of the Company ever suggest that the Union should deal with the Brewer's Association rather than the Company over the matter of the plant rules.

The facts, we submit, make it clear that, contrary to the Company's argument, the Union properly addressed its bargaining request to the Company, and that its failure to seek bargaining from the multi-employer bargaining association, of which the Company is a member, did not, in the circumstances, justify the Company's refusal to bargain. Bargaining on an individual basis between an employer-member of a multi-employer bargaining association and the union, for the purpose of handling particular conditions prevailing at that employer's facility but not necessarily common to the group, is permissible for it is neither inconsistent with nor destructive of the principle of group bargaining. *Retail Clerks Union, No. 1550 v. N.L.R.B.*, 330 F.2d 210, 213, 216 (C.A.D.C.), cert. denied, 379 U.S. 828; *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of Amer.*, 341 F.2d 482, 488-489 (C.A. 2); *Western States Regional Council v. N.L.R.B.*, __ F.2d __, 68 LRRM 2506, 2508-2509, n. 3 (C.A. D.C., No. 21,317, decided June 19, 1968); *The Kroger Co.*, 148 NLRB 569, 573. Accordingly, where a single employer takes action peculiar to it, a request for bargaining made upon that employer is appropriate and creates a bargaining obligation on that employer. *N.L.R.B. v. Spun-Jee Corporation*, 385 F.2d 379, 383 (C.A. 2). Plainly, the request on the Company here was a valid request. The plant rules, which were issued by and through the Company, not the Association,[8] were intended to apply only to the Company's plant, not the plants of the other employer-members of the Association. It was, therefore, entirely proper for the Union to ask the Company to bar-

[8] Past practice was for the other individual employer-members of the Association, including the predecessor-Company, General Brewing, to issue plant rules themselves, applicable only to their own plants (R. 18; Tr. 22-23, 72-73, 78-79, 81-82, R. Exh. 2 and 8).

gain itself about its own act, which had no impact other than in its own plant.

To be sure, an employer is free to designate agents to represent it in bargaining, and it is lawful for an employer to decline to bargain with a union except through its duly designated representative. Nonetheless, as the statute specifies, the ultimate obligation to bargain rests on the employer and, accordingly, a demand on him to bargain, at least initially, is clearly appropriate. If the employer, as principal, then wishes to deal with the Union only through its authorized agent, it is necessary that he make that fact plain to the union. The Company here followed no such procedures. Not only is there no evidence based on past practice or otherwise that the subject of plant rules was a matter to be handled by the Association, but the consistent issuance of plant rules by and through the individual members of the Association, including the respondent Company in the instant case, indicates that it was not. Moreover, the Company at no time before or after the Union's bargaining demand informed the Union that it wanted to deal with it only through the Association about the matter. It is apparent, then, that the Company did not refuse to bargain with the Union over its plant rules because it wanted such discussions to proceed with its agent, and that its present contention to this effect is simply an afterthought.

There is no merit to the Company's further argument that the Union, in attempting to bargain with the Company individually, was effectively seeking fragmentation of the established multi-employer bargaining unit. There is no evidence that the Union's purpose, in asking for bargaining about the plant rules, was other than to bar-

gain with the Company concerning a subject peculiar to it and having no relevance to the Association as a whole or the other employer-members, a legitimate objective as the cases cited *supra*, p. 10, demonstrate. Such bargaining would not have caused any disruption in the overall unit, which would have remained intact as the basic bargaining unit for the handling of all problems common to the group. *The Kroger Co., supra,* 148 NLRB at 573-575.

D. The Union has not waived its right to bargain about the plant rules

1. *The past practice of the parties did not amount to a waiver with respect to the present issuance of plant rules*

As noted *supra*, p. 10, n. 8, in the past other members of the multi-employer association, including the predecessor company, General Brewing, had unilaterally issued plant rules, none of which were protested by the Union (Tr. 23, 73, 78-79, 82). In view of this fact, the Company contends that the Union has waived its right to bargain about its present issuance of plant rules. Plainly, however, a union's inaction in the past with respect to a bargainable subject cannot be regarded as a waiver for all time of its right to bargain about the subject. At most, such silence or acquiesence constitutes only a waiver of its right to bargain as to that specific event, or, where the subject occurs in the course of general contract negotiations, a waiver as to that subject for the term of the contract.[9] Accordingly,

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[9] *Pacific Coast Assn. of Pulp & Paper Manufacturers,* 133 NLRB 690, 691, n. 2, enf'd, 304 F.2d 760, 763-765 (C.A. 9) (waiver of right to bargain at association level on subject of pensions during contract negotiations for 15 years did not preclude assertion of right in new contract negotiations); *General*

the Union's past conduct here is irrelevant, and since the Union promptly asserted its right to bargain about the Company's present issuance of plant rules, there is no basis for finding a waiver of its right to bargain from its actions.

The Board cases cited by the Company,[10] dealing with the question of subcontracting as a bargainable matter, are not in point. It is true that in those cases the Board stated that a previous practice of subcontracting was one element considered by it in dismissing a complaint attacking an employer's failure to give a union a prior opportunity to bargain before letting a particular subcontract. However, as the Board pointed out, for example, in the *Westinghouse-Mansfield Plant* case, the prior practice involved generally consisted of the daily awarding of many subcontracts, totalling in the thousands each year. Such a practice had become, in effect, the usual method of conducting business and was a constant fact of life for the unit employees. 150 NLRB at 1576. By contrast, the issuance

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Telephone Company of Florida v. N.L.R.B., 337 F.2d 452, 454 (C.A. 5) (failure to protest unilateral changes in or abolition of Christmas checks in past was not waiver of right to bargain about present discontinuance of checks); *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874, 878 (C.A. 3) (prior unilateral changes in a Supplementary Compensation Plan did not relieve employer of duty to bargain where Union protested present changes. "The union, faced with the Company's practice over the years, might well have remained quiescent until such time as it was seriously dissatisfied with the formula.") See also *Armstrong Cork Company v. N.L.R.B.*, 211 F.2d 843, 848 (C.A. 5).

[10] *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574; *Shell Oil Company*, 149 NLRB 283; *Kennecott Copper Corp. (Chino Mines Division)*, 148 NLRB 1653; and see *American Oil Company*, 151 NLRB 421; *Superior Coach Corporation*, 151 NLRB 188; *Westinghouse Electric Corp., Etc.*, 153 NLRB 443.

of plant rules in the instant case has occurred but three or four times in the last twelve or thirteen years among the various members of the multi-employer association. It was not, therefore, an event which the employees had to cope with on a frequent basis.

In any event, the prior practices in the subcontracting cases were only one of several factors relied on by the Board to support its finding that no violation had occurred. The Board also noted such things as the absence of any significant detriment to the unit employees,[11] the presence of contractual provisions empowering the employer to subcontract, and the opportunity to bargain about the decision to subcontract subsequently afforded the union. None of these additional bases is present here. The promulgation of the plant rules produced an obvious detriment for the employees by restraining their actions in important areas where they were formerly free to act. (The fact that the restraint may not be tangibly felt until an employee broke one of the rules is completely immaterial. The rule, which is at all times in effect, itself inhibits activity.) As shown *infra*, pp. 15-17, no provisions in the collective bargaining contract sanctioned the Company's action. Finally, the Company's flat refusal to discuss its plant rules precluded even subsequent bargaining about the rules. The Board's "subcontracting" cases, therefore, are not controlling. The Third Circuit reached the same conclusion in a comparable situation in *Leeds & Northrup Co. v. N.L.R.B., supra*, 391 F.2d at 878-879.

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[11] See *District 50, United Mine Workers, Local 13942 v. N.L.R.B.*, 358 F.2d 234, 237-238 (C.A. 4); but see *International Union, U.A., A. & A. Imp. Wkrs. v. N.L.R.B.*, 381 F.2d 265, 266 (C.A.D.C.), cert. denied, 389 U.S. 857.

2. *The provisions of the collective bargaining agreement do not constitute a contractual waiver*

The collective bargaining contract contained provisions relating to safety and granting the employer the right to discharge employees for "just cause."[12] The Company contends that these clauses gave it the right to issue plant rules unilaterally and, therefore, amounted to a contractual waiver by the Union of its right to bargain about the Company's issuance of plant rules. Plainly, they do not. It is settled law that a purported waiver, in a contract, of the statutory right to bargain, must, to be effective, be in "clear and unmistakable" language—"a mere inference, no matter how strong, should be insufficient." *N.L.R.B. v. Perkins Machine Com-*

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[12] ARTICLE VII. WORKING CONDITIONS

(b) *Safety Rules.* In the interest of maintaining high standards of safety, and to minimize industrial accidents and illness, the following is agreed:

(1) The Employer will comply with all State and Federal safety and sanitary laws. Suitable washrooms and lockers shall be maintained and kept in clean and sanitary conditions.

(2) Adequate safety devices shall be provided by the Employer, and when such devices are furnished, it shall be mandatory for employees to use them.

(3) No employee shall be discharged or disciplined for refusing to work on a job if his refusal is based upon the claim that said job is not safe, or might unduly endanger his health, until it is determined by the Employer that the job is or has been made safe, or will not unduly endanger his health. Any dispute concerning such determination is subject to the grievance procedure.

ARTICLE XII. RIGHTS OF MANAGEMENT

The Union concedes the right of the Employer to discharge any Machinist or Helper for just cause.

Should Machinist or Machinist's Helper be unable to continue his employment due to illness or injury, he shall report to his foreman at the earliest possible moment.

pany, 326 F.2d 488, 489 (C.A. 1).[13] The clauses involved here, we submit, fall far short of meeting this standard.

Thus, the clauses themselves say nothing whatever about the promulgation of rules of any kind, nor do they, by their terms, envision the subsequent issuance of rules interpreting, clarifying or explaining them. To be sure, the Company's "right" to discharge "for just cause," a standard, general provision appearing in most collective bargaining agreements,[14] is not specifically defined in this contract. However, the absence of a detailed catalogue of offenses warranting discharge does not, as the Company urges, automatically give the Company the unfettered right to draw up the list. Certainly,

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[13] Accord: *Fafnir Bearing Company v. N.L.R.B.,* 362 F.2d 716, 722 (C.A. 2); *International Telephone and Telegraph Corp. v. N.L.R.B.,* 382 F.2d 366, 373 (C.A. 3), cert. denied, 389 U.S. 1039; *Leeds & Northrup Company v. N.L.R.B., supra,* 391 F.2d at 878; *N.L.R.B. v. Item Company,* 220 F.2d 956, 958-959 (C.A. 5), cert. denied, 352 U.S. 917; *Timken Roller Bearing Company v. N.L.R.B.,* 325 F.2d 746, 751 (C.A. 6), cert. denied, 376 U.S. 971; *Dura Corporation v. N.L.R.B.,* 380 F.2d 970, 972-973 (C.A. 6); *International Woodworkers of Amer., Local 3-10 v. N.L.R.B.,* 380 F.2d 628, 629-630 (C.A.D.C.); *International Union, U.A., A. & A. Imp. Wkrs. v. N.L.R.B., supra,* 381 F.2d at 267. See also *C & C Plywood Corporation,* 148 NLRB 414, 416, in which the Board, in construing a contractual provision, applied the "clear and unmistakable" test. The Supreme Court, in later upholding the Board, said, "We cannot disapprove of the Board's approach." *N.L.R.B. v. C & C Plywood Corp.,* 385 U.S. 421, 430. It is, of course, well established that the Board has the power to construe contractual clauses in cases of this kind. *N.L.R.B. v. C & C Plywood, supra.*

[14] As of September 1965, "Grounds for discharge are stated in 90 percent of contracts. A general statement to the effect that discharge can be made for "cause" or "just cause" appears in 73 percent of the total. But many of these contracts, plus others which omit general statements (51 percent all told), go on to list one or more specific grounds for discharge." BNA, Collective Bargaining, Negotiations and Contracts, 40:1.

the clause does not expressly grant the Company any such rights. Rather, the phrase, "just cause," would clearly comprehend only what had traditionally been agreed to be a ground for discharge in the plant in the past, as found in the express terms of the contract, the prior written plant rules, or the practice of the parties. Without more, it cannot be authority for the unilateral imposition of new and different standards of conduct, not previously known in the plant. In any event, the most that could be said for the phrase is that it might "arguably" grant the employer such power to act. A phrase of this nature, however, does not satisfy the "clear and unmistakable" test. It cannot, therefore, qualify as a waiver of the statutory right to bargain about the subject of plant rules.

Similarly, the "Safety Rules" provisions merely require the employer and the employees to observe certain listed safety practices and employ safety devices. Nothing is said about any alleged right of the Company to define other safety rules. Moreover, the safety rules are concerned solely with questions of safety, and are, accordingly, irrelevant to the issue of the Company's authority with respect to plant rules, the principal subject of inquiry herein.[15]

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[15]To the extent that some arbitrators' decisions (See Dunau, Contracts and Unfair Labor Practices, 57 Colum. L. Rev. 52, 79) may have sanctioned the unilateral issuance of plant rules in any case other than one in which such act was expressly permitted by the applicable contract, we submit that such decisions are irrelevant in that they fail to give full recognition to the Union's statutory right to bargain or to accept the principle that only a "clear and unmistakable" waiver of the right will be given effect. As previously noted *supra*, p. 16, n. 13, this is the approach approved by the Supreme Court for handling such problems.

E. The Board Properly Exercised Its Power To Adjudicate the Unfair Labor Practice Herein Despite the Availability of Contractual Grievance and Arbitration Procedures

The collective bargaining agreement contained a four-step grievance procedure for the resolution of grievances involving, *inter alia,* the "meaning and application of the provisions of this agreement," culminating in "final and binding arbitration" (Article VI, G.C. Exh. 3). It is settled, however, as the Company apparently concedes, that under Section 10(a) of the Act[16] the Board is not obliged to refrain from exercising its jurisdiction by the existence of alternative arbitration procedures.[17] Nonetheless, the Company argues that, under the facts presented here, the Board should have exercised its discre-

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[16] "This power [to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ."

[17] *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436-437; *N.L.R.B. v. Walt Disney Productions*, 146 F.2d 44, 48 (C.A. 9), cert. denied, 324 U.S. 877; *N.L.R.B. v. M & M Oldsmobile, Inc.*, 377 F.2d 712, 715-716 (C.A. 2); *N.L.R.B. v. Scam Instrument Corp.*, __ F.2d __, 68 LRRM 2280, 2282 (C.A. 7); *N.L.R.B. v. Huttig Sash & Door Co.*, 377 F.2d 964, 970 (C.A. 8); *American Fire Apparatus Company v. N.L.R.B.*, 380 F.2d 1005, 1007 (C.A. 8). Compare *N.L.R.B. v. Tom Johnson, Inc., supra,* 378 F.2d at 343 (C.A. 9).

tion to decline to assert its jurisdiction, and remitted the Union to whatever remedies might be available to it under the grievance-arbitration provisions of the contract. We show below that the Board here did not abuse its discretion by assuming its undoubted jurisdiction.

In general, the Board will decline to make a finding of an unfair labor practice violation and defer to arbitration where the parties have already obtained an arbitrator's decision, or are in the process of obtaining such a decision, the existence of the unfair labor practice turns primarily on an interpretation of a specific contract provision, and it is "reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act."[18] The Board also considers such factors as whether sending the parties to arbitration will result in duplication and delay.[19]

Plainly, the instant case was not one warranting deferral to arbitration. In the first place, the controversy has never been submitted to an arbitrator.[20] Further, the issues here do not turn solely

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[18]*Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1415-1416. See also, *C & S Industries, Inc.*, 158 NLRB 454, 459-460; *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom., Ramsey v. N.L.R.B.*, 327 F.2d 784, 787-788 (C.A. 7), cert. denied, 377 U.S. 1003; *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082; *Dubo Manufacturing Corporation*, 142 NLRB 431, 432, 148 NLRB 1114, 1116, enf'd, 353 F.2d 157 (C.A. 6); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-272.

[19]*Unit Drop Forge Div.*, 171 NLRB No. 73, 68 LRRM 1129, 1131-1132.

[20]*N.L.R.B. v. Huttig Sash & Door Co., supra,* 377 F.2d at 970.

or even primarily on an interpretation of a contract provision, for the Company defends its action on several grounds other than its contract. Moreover, the issue of contract interpretation is not a substantial one, peculiarly within the competence of an arbitrator; rather, it is one wholly suitable for Board determination since it involves, *inter alia*, application of the principle that waiver of the statutory right to bargain can only be shown by "clear and unmistakable" contract language.[21] And if an arbitrator were to render a contrary decision, the Board could not give hospitable acceptance to it because it would necessarily be one opposed to the settled principles of law involved here, and thus repugnant to the purposes and policies of the Act. Finally, to require the parties at this stage of the litigation, a year and a half or more after the onset of the dispute, to present the case to yet another forum for resolution, would im-

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[21] *Compare Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506, 1508; *Century Papers, Inc.*, 155 NLRB 358, 361-362; *C & S Industries, Inc., supra; Gravenslund Operating Co., d/b/a Washington Hardware*, 168 NLRB No. 72, 66 LRRM 1323, 1324, with *The Crescent Bed Company, Inc.*, 157 NLRB 296, 299.

pose needless duplication and delay without gaining any corresponding advantages.[22]

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[22]Following issuance of the Board's Decision and Order herein, the Company moved to reopen the record for the reception of additional evidence, asserting that in the most recent (1967) contract negotiations between the Union and the Association, the Union did not ask either the Company or the Association to bargain about the plant rules (R. 32-46). The Company argued that the Board's order should be withdrawn on the ground that even if it had failed to tell the Union at the time of the original demand that it should bargain with the Association rather than it about the plant rules, it had in effect done so by taking that position in the course of the instant litigation, and the Union's subsequent failure to request the Association to bargain over the matter therefore constituted a waiver of its right to bargain about it now or in the future (R. 33-36). The Board denied the motion as "lacking in merit" (R. 49).

The Board's ruling was manifestly correct. In the first place, the issue with respect to the proper party for bargaining was but one of many contentions made by the Company to support its total refusal to bargain. There is no reason to believe that the Company has abandoned any of its other grounds, and in particular the Company has not stated that, despite its basic position that it is not obligated to bargain about the plant rules, it is now freely willing to bargain on the subject, either by itself or through the Association. Accordingly, the Union had no reason to assume that a later request on the Association would be any less futile than its former one on the Company. In any event, at best, the legal position adopted by the Company in this litigation can be construed as nothing more than a declaration that it is now ready to comply with the law and bargain with the Union about its plant rules, albeit through the Association. However, a claim by a respondent that it has ceased and desisted from committing the particular unfair labor practice with which it is charged, is neither an adequate remedy for the unfair labor practice, nor a barrier to enforcement of the Board's order based on that unfair labor practice. *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-570; *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 399, n. 4; *Local 1976, Carpenters v. N.L.R.B.*, 357 U.S. 93, 97, n. 2; *N.L.R.B. v. United Brotherhood of Carpenters & Joiners*, 321 F.2d 126, 129 (C.A. 9), cert. denied, 375 U.S. 953; *Pacific Coast Assn. of Pulp and Paper Mfrs. v. N.L.R.B.*, 304 F.2d 760, 765 (C.A. 9); *N.L.R.B. v. Trimfit of California*, 211 F.2d 206, 209 (C.A. 9). The

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[23]

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question of whether and to what extent circumstances prevailing now or in the future may affect the Company's bargaining obligations is a problem which should be left to the compliance stages of this proceeding. *Solo Cup Company v. N.L.R.B.*, 332 F.2d 447, 449 (C.A. 4).

[23] Before the Board the Company attacked the portion of the Board's order requiring the Company to cease and desist from "in any like or similar manner interfering with, restraining or coercing employees in the exercise of their bargaining rights" (R. 20). Such a provision is clearly proper. *Lloyd A. Fry Roofing Co. v. N.L.R.B.*, 220 F.2d 432, 433 (C.A. 9).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer–

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district

court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States

upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Index to Reporter's Transcript

(Numbers are to pages of the reporter's transcript)

Board Case No. 31-CA-540

GENERAL COUNSEL'S EXHIBITS

NO.	IDENTIFIED	OFFERED	RECEIVED IN EVIDENCE
1(a)-1(i)	5	5	5
2	5	5	6
3	6	6	6
4	7	7	7
5	20	20	21

RESPONDENT'S EXHIBITS

NO.	IDENTIFIED	OFFERED	RECEIVED IN EVIDENCE
1(a)-1(d)	15	15	16 (rejected)
2	22	23	24
3	30	30	30
4	34	34	34
5	35	83	84
6	60	61	61
7(a) and 7(g)	68	68	69
8	72	74	75
9	75	76	76 (rejected)
10	78	79	79

No. 22,698

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MILLER BREWING COMPANY,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

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No. 22,698

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On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

Jurisdiction.

The Respondent concedes the jurisdiction of this Court as set forth in Petitioner's Brief (Pet. 1-2).[1]

Statement of the Case.

As stated by Petitioner ". . . [T]he Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about plant rules which the Company unilaterally issued." (Pet. 2). If this case

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[1]References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings", are designated as "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated as "Tr." References designated "R. Exh." and "G.C. Exh." are to the exhibits of Respondent and the General counsel, respectively. References designated "Pet." are to portions of Petitioner's Brief.

involved nothing more than a bare refusal to bargain over plant rules by an individual company with a duly certified union, this case would not be before this Court. In fact, the Court may question why this case is of sufficient significance to either the Board or Respondent to be the subject of a Petition for Enforcement.

We submit that the case should not be before the Court, that the charge should have been dismissed, and that rather than effectuating the policies of the Act, to grant enforcement would be inimical to the policies of the Act.

The easy course for Respondent would have been to "bargain" when the Union[2] initially made its demand concerning the plant rules or to have "bargained" at any further stage of the proceeding. We do not believe on the basis of the record and the admissions by the Union witnesses as to the recognition and acceptability of practically all of the plant rules, that negotiations would be that onerous considered in a vacuum. However, for the reasons set forth the principles in this case transcend the limited narrow question of negotiations over plant rules.

These reasons include:

1. The demand for bargaining upon Respondent directly and alone was inadequate, improper and in derogation of the authority and status of the established industry-wide collective bargaining unit and the designated industry representation. The California Brewers Association was the representative of all the companies, had engaged in all the negotiations with the Union for

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[2]International Association of Machinists and Aerospace Workers, AFL-CIO.

a good many years, and in fact through its predecessor was a party to the certification by the Board of the Union as the bargaining representative. The Board would improperly place the burden upon the Respondent to advise the Union of the correct procedure to request bargaining rather than requiring the Union to make a proper demand as the Union did not.

2. There was no refusal to bargain in that the rules did not substantively and unilaterally change working conditions but were merely and basically a codification of existing rules, some previously posted and most generally well known to the employees. The rules were not unusual or extreme, but are common in the industry and in most industrial plants. Some of the rules such as those prohibiting gambling are no more than consistent with State law. Under the circumstances here, particularly when there was no proper demand upon the duly designated representative, to bring to bear the full force of the Board and a Court enforcement of such order is not consistent with and will not effectuate the policies of the Act.

3. The Union waived any right to insist upon bargaining concerning issuance of the plant rules by Respondent in view of the provisions of the agreement and the unilateral promulgation and use of plant rules by other companies, members of the same collective bargaining unit. The rejection of this argument by the Board points up its determination to require individual bargaining on matters which the Board contends affect only individual companies. The impact of any negotiations by Respondent would, of course, have been felt by the Association and its members and any negotiations on plant rules themselves were clearly and properly a

matter to be considered as part of industry-wide negotiations.

4. Any question as to whether there was a waiver and whether the Respondent had the right under the agreement to issue the plant rules was a matter properly subject to the contractual grievance and arbitration procedures. As stated, the subject matter of this unfair labor practice proceeding should not be before the Court but should have been left to the procedures agreed upon and available to the parties.

5. As of the time of the 1967 negotiations, following the hearing in this matter, the Union was well advised and instructed concerning Respondent's position that negotiations were to be conducted upon proper demand to the Association. Although the Union bargained with the Association on various contract matters in 1967, there was no demand to bargain concerning the right of a company to issue rules unilaterally or the rules themselves. This constitutes a further waiver and abandonment by the Union of any right to bargain on these plant rules and we submit there is no present or continuing proper bargaining demand.

Statement of the Facts.

Petitioner summarized some of the salient facts (Pet. 2-5). However, we believe that we must set forth our own statement of facts, some of which will be repetitious of those set forth by the Petitioner but are necessary for a proper understanding and resolution of the important issues presented.

Since 1950 the charging party, the Union, has been the certified representative of certain craft employees employed as machinists by members of the California

Brewers Association (formerly California State Brewers Institute[3]). Although some changes have occurred in the employers, the Association has continued to be the established and recognized representative of the members. The present members include Anheuser-Busch, Inc., Pabst Brewing Company, Jos. Schlitz Brewing Company, Theo. Hamm Brewing Company, Miller Brewing Company and General Brewing Corporation (formerly known as Lucky Lager Brewing Company and prior to the acquisition by Respondent, the owner of the Azusa plant) [R. 17].

There is no evidence of any negotiations or demand for negotiations on an individual employer or plant basis prior to the demand of the machinists in this case. Negotiations have always been conducted on an industry-wide basis through the California Brewers Association. The Association is a nonprofit California corporation, having as one of its principal purposes the negotiation and administration of collective bargaining agreements. All of the companies referred to above are members of the Association and bargain through the Association. Individual employers do not bargain on an individual basis but rather master agreements are negotiated which are signed by representatives of the Association. This is the procedure with all of the various unions including the Teamster Brewery and Soft Drink Workers Joint Board of California, the union representing the majority of the employees [R. 17; Tr. 11-12].

Negotiations with the Machinists Union have been conducted over the last number of years including nego-

[3]See *California State Brewers Institute*, 90 NLRB 1747.

tiations in 1956, 1957, 1958, 1960, 1962, 1964 and 1967 [R. 17; Tr. 13].

The only evidence of any demand for bargaining concerning plant rules by any of the unions on the Association was by the Teamster Brewery and Soft Drink Workers Joint Board of California in the 1964 negotiations. At that time the demand was resisted by the industry through the Association and no provision was included in the collective bargaining agreement concerning the issuance of plant rules [Tr. 75].

On May 1, 1966, Respondent acquired the Azusa plant of General Brewing Corporation. From May 1 to October 24, 1966, the Respondent was engaged in the refurbishing, remodeling and repairing of the plant to ready it for production. At the plant there are some 200 employees represented by numerous unions, only 16 of whom are represented by this Union [R. 17; Tr. 9].

At an orientation meeting in May, 1966, the employees including the machinists were advised on certain matters including some plant rules [R. Exh. 6; Tr. 61].

As of May 1, 1966, the Association and the Union entered into an Adoption Agreement whereby Respondent became a party to the collective bargaining agreement between the Association and the Union. This agreement was executed by the Association and the Union representatives. It was not an individual agreement executed by Respondent [G. C. Exh. 2].

Respondent determined, as do most industrial plants, that it should promulgate plant rules covering its employees including employees represented by the seven unions representing employees at the plant. Detailed

and comprehensive rules were in effect at other plants within the certified unit represented by the California Brewers Association. None of these rules have been negotiated [Tr. 23, 73, 79] although they are similar to the rules issued by Respondent.

Anheuser-Busch, Inc. has a detailed nine-page booklet covering plant rules, safety regulations and precautions, equipment, tools and machines and general rules [R. Exh. 2]. These rules are available to the employees and have been since Anheuser-Busch established its plant in 1953 or 1954 [Tr. 23].

Another member of the Association, Pabst Brewing Company, has a set of rules which are distributed to the employees at the time they are hired. The employees sign a receipt for the rules agreeing to study the rules and any subsequent instructions as issued [R. Exh. 8]. The rules include everyday safety rules and general rules and regulations. It is specifically provided that disciplinary action will be taken for violation of the rules and it is even designated that violation of certain rules are cause for dismissal such as intoxication and punching time cards [R. Exh. 8].

Theo. Hamm Brewing Company has plant rules which have been in effect since 1958. There are 42 rules including penalty guides for first, second, third and fourth offenses, including such penalties as suspension, written reprimands and discharge. Any four violations within a twelve month period are cause for discharge and the penalties prescribed are minimum [R. Exh. 10].

General Brewing Corporation, owner of the Azusa plant prior to Respondent's advent, had a set of rules. Many rules were individually posted on such matters

as punching another employee's time card, bringing whiskey into the plant, punching out at the end of the day, card playing, reporting in in the event of sickness [Tr. 81, 82, 92-93]. Some of these rules were codified into a single document and posted on various bulletin boards. There were no negotiations on these rules nor any demand for negotiations by any of the various unions [Tr. 82, 83].

As stated, Respondent believed it was appropriate to publish plant rules similar to the rules in effect at the main plant in Milwaukee [Tr. 67]. The rules were placed into effect prior to the time Respondent began operations in October, 1966. The proposed rules were first distributed to department heads of the Respondent for suggestions and to see if they violated any collective bargaining agreement [Tr. 59]. The rules were distributed to the employees in September, 1966, a few months after Respondent acquired the plant and before operations began [R. 17].

Many employees represented by other unions signed for the rules without objection. Respondent requested that the employees sign for the rules but did not require that they do so [R. Exh. 3]. With the exception of the demand by the Machinists Union for negotiations, there was no demand for negotiations by any of the unions involved representing collectively the vast majority of the employees, nor any grievance filed [Tr. 62].

Contrary to the statement of Petitioner, at no time did Respondent "flatly refuse[d] to enter into a discussion with the Union at any time about the rules." (Pet. 9). Not only did Respondent take the position at the hearing that they were willing to discuss the meaning and application of the rules [Tr. 25-26] but even

at the time of the promulgation of the rules they were reviewed and discussed upon request (although not negotiated with the other unions). For example, representatives of the Teamster Brewery and Soft Drink Workers Joint Board of California inquired as to how "tough" the Respondent was going to be in connection with the rules about soliciting and gambling [Tr. 65, 66, 86]. A representative of the Operating Engineers Union advised the Respondent that if there was a problem concerning the rules he would file a grievance. A steward for the electricians even volunteered that he felt the rules were a decent set of rules [Tr. 87].

The Machinists Union advised their members not to sign for the rules and the employees objected to the distribution based upon advice from their representative. At no time was there an objection to any specific rule although the Respondent did review and discuss the rules with the employees. The employees had only two basic questions, how the rule on gambling would be enforced and also the rule on soliciting. The Respondent explained on the question of solicitations that they had no objection to the practice of soliciting to help an employee in case of an illness or death but that they wanted to hold the collections down. As to the gambling rule it was explained that the Respondent was concerned about such matters as a large football pool [Tr. 85-86].

There has been no grievance filed concerning the rules or the application of any rule following this discussion with the employees [Tr. 50]. Through the candid testimony of the Union steward it was established that virtually all of the rules were well known to the employees (Petitioner contends to the contrary. Compare Pet. 4,

7). The issuance of the rules did not impose any substantially new or different standards of conduct and were, as testified, already well known and in existence.

The rules that were well known and recognized by the employees include:

1. Theft or misuse of Company equipment;
2. Misuse or removal of Company property;
3. Unauthorized disclosure of Company information;
4. Restricting production;
5. Falsification of records;
6. Bringing narcotics and intoxicating liquors into the plant;
7. Immoral conduct or indecency;
8. Punching time cards;
9. Insubordination;
11. Fighting [G. C. Exh. 4, Major Rules; Tr. 37-40].

The witnesses were also aware of the following rules which are entitled "General Rules":

1. Failure to be at work station;
3. Calling in in advance if absent;
4. Punching time card;
5. Punching out within 20 minutes after end of shift;
10. Neglecting duties and responsibilities;
11. Loitering or wasting time;
12. Creating unsanitary or poor housekeeping conditions;
14. Unauthorized or repeated absenteeism or lateness;

16. Reporting for work in unfit condition;
17. Failure to work safely [G. C. Exh. 4, Tr. 41-45].

The witnesses were also aware of the following Safety rules:

1. Reporting injuries;
2. Using safety devices;
5. Not hitching rides;
6. Using eye and other personal protective equipment;
7. Following other safe practices [G. C. Exh. 4; Tr. 46-47].

Following distribution of the rules to the employees a business representative of the Union called the plant manager and demanded that the Respondent negotiate the rules. The Respondent explained its position that it did not feel that it was under an obligation to do so [Tr. 20].

The business representative of the Union said that they were going to file an unfair labor practice charge, but he made no objection to any particular rule and he did not request an opportunity to discuss the meaning or application of any particular rule. The Respondent has never refused to discuss the application of the rules or the application of any particular rule [Tr. 63, 64, 66]. As stated above, at the hearing before the Trial Examiner, counsel for Respondent reaffirmed this willingness:

> "[T]he Company's position is now and at all times has been that we are willing to discuss these rules as to their meaning or application, and any

> clarification or anything along that line. The Company's position is for the various reasons set forth in the Answer, alleged in the Answer, that they did not have to negotiate, and that is still our position, but we are not opposed to discussing them and attempting to resolve any questions or concerns as to the application of the rules." [Tr. 26].

The Union then sent a formal letter of demand for negotiations [G. C. Exh. 5]. The Respondent did not respond as the letter did not require a response in view of the announced intention of the Union to file an unfair labor practice charge [Tr. 64].

At no time has there been any demand on the Association concerning the issuance or promulgation of the rules by Respondent [Tr. 22].

The hearing was held on February 28, 1967, the Trial Examiner's Decision issued on May 17, 1967, and the Board's Decision on July 20, 1967 [R. 16, 30]. After the hearing and while the case was pending before the Board and even after the case had been decided by the Board, negotiations were conducted between the Association and the Union [R. 32-46]. The 1967 negotiations with the Union commenced on July 10 and concluded on September 2, 1967. Negotiations, as for many years previously, were conducted through the Association and not by the individual companies. The Memorandum Agreement settling the negotiations was executed by the Association representatives on be-

half of the Respondent. There was no demand for individual bargaining. There was no demand by the Union for negotiations concerning plant rules.

This was in spite of the fact that the Union had been specifically and clearly advised of the position of Respondent that the Association was the proper representative and the representative through whom Respondent wished to negotiate.

Respondent moved to reopen the record on the basis of this additional information, which motion was rejected [R. 49].

ARGUMENT.

The Company Did Not Violate Section 8(a)(1) and (5) of the Act.

The Respondent was not obligated to bargain with the Union concerning the issuance of plant rules under the timing and character of the Union's demand for bargaining. This case does not involve a simple refusal to bargain over plant rules upon a proper and timely demand.

If this case simply involved a refusal to bargain concerning plant rules it would not be before this Court. We may concede that plant rules do affect wages, hours and working conditions and are a mandatory subject of bargaining.[4]

Certainly this Court should not be burdened with a petition for enforcement solely involving the question of whether bargaining on plant rules is mandatory. What distinguishes this case from any and all cases cited by Petitioner are the peculiar and controlling circumstances of the Union's demand.

The demand was not a proper demand. It was not made on the proper representative. It was not made at the proper time. There had been a waiver by the Union based upon the conduct of the parties to the agreement, coupled with the language of the agreement itself. Any questions raised should have been resolved through utilization of the grievance procedure. Finally, the Union failed to make a proper demand in recent negotiations with the Association when the contract was

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[4] *N.L.R.B. v. Gulf Power Company* (5th Cir. 1967), 384 F. 2d 822, 825; *Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1304, enforced in part (8th Cir. 1964) 341 F. 2d 1020.

open and a demand on the Association would have been clearly proper. Such failure precludes enforcement.

None of the cases cited by the Petitioner involve solely the issuance of plant rules and a refusal to bargain concerning them (Pet. 6-7). Each of the cases involved a range of activity by the employer of which the alleged changes in plant rules, if any, were only one part and in addition, the changes themselves were substantive and had an immediate effect upon the employee.[5]

The Demand for Bargaining Upon Respondent Alone Was Improper and in Derogation of the Industry-Wide Bargaining Unit and Representation.

Petitioner admits:

> "To be sure, an employer is free to designate agents to represent it in bargaining, and it is lawful for an employer to decline to bargain with a union except through its duly designated representative." (Pet. 11).

The agent and the only agent designated or recognized by the parties as the representative of the employer was the Association. The evidence in the instant case is uncontroverted. All bargaining from the date of the Union's certification has been on an industry-

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[5]*Lloyd A. Fry Roofing Co. v. N.L.R.B.* (9th Cir. 1954), 216 F. 2d 273, 274, 276, employer abolished rest periods with immediate effect upon employees. Did not involve plant rules; *N.L.R.B. v. Tower Hosiery Mills* (4th Cir. 1950), 180 F. 2d 701, 703, cert. denied, 340 U.S. 811, employer unilaterally made wage increases and changed work requirement. Did not involve plant rules; *N.L.R.B. v. Gulf Power Company* (5th Cir. 1967), 384 F. 2d 822, 825, did involve a demand for negotiations concerning safety rules during regular negotiations.

wide basis through the California Brewers Association or its predecessor. All bargaining, whether with this Union or any other union, has been on this basis. There is no evidence of any bargaining on any subject by any individual company. The Union well knew who the bargaining representative was and if it wished to bargain the demand should have been made upon the Association.[6]

So long as an employer does not choose as a representative someone who will make good faith collective bargaining an impossibility, he may choose anyone he desires to represent him, and, this choice must be accepted by the union seated across the bargaining table.[7]

Petitioner suggests that a demand upon the employer "at least initially" is appropriate (Pet. 11). The Respondent has been charged with an illegal refusal to bargain. To prove such an illegal refusal, the burden was upon the General Counsel to establish a proper demand for bargaining. He did not.

Petitioner suggests that the practice of the other employers in unilaterally issuing plant rules indicates

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[6] "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) *an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;*" 29 U.S.C. §158(b)(1) (Emphasis added).

[7] *Painters' Local 823* (1966), 161 NLRB No. 44, 1967 CCH NLRB 20,857; *Orange Belt District Council of Painters No. 48* (1965), 152 NLRB 1136; *Plasterers' Local 2 AFL-CIO* (1964), 149 NLRB 1264; *Warehousemen Local 986* (1964), 145 NLRB 1511; *Southern California Pipe Trades District No. 16* (1967), 167 NLRB No. 143, 66 LRRM 1233.

that the subject of plant rules was not to be handled by the Association (Pet. 10). To the contrary, as set forth below the practice merely establishes that the Union had waived negotiations on the matter and that Respondent had the right under the contract to issue such rules. Such practice does not indicate nor can it in any way constitute an admission that any bargaining demand on any subject was to be addressed to an individual member rather than through the Association.

Petitioner suggests that the employer's contention that bargaining should have proceeded through the Association was an afterthought (Pet. 11). There is no evidence from which to draw such inference but to the contrary the evidence is that all negotiations have at all times been through the Association. There is no testimony by any Union witness or contention even made that any bargaining had ever been on an individual plant or company basis. Characterizing Respondent's contention as an afterthought is an attempt to find a rationale to support an inadequate and improper demand to bargain with an individual company who has designated an association as its representative.

Petitioner cites certain cases for the proposition that individual bargaining on certain matters is not necessarily inconsistent with group or association or multi-employer bargaining (Pet. 10).[8] None of these cases hold that an employer can be required to bargain

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[8]*Retail Clerks Union, No. 1550 v. N.L.R.B.* (D.C. 1964), 330 F. 2d 210, 213, 216, cert. denied, 379 U.S. 828; *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America* (2d Cir. 1965), 341 F. 2d 482, 488-489; *Western States Regional Council v. N.L.R.B.* (D.C. 1968), ... F. 2d ....., 68 LRRM 2506, 2508-2509, n. 3, No. 21,317, decided June 19, 1968; *The Kroger Co.* (1964), 148 NLRB 569, 573; *N.L.R.B. v. Spun-Jee Corporation* (2d Cir. 1967), 385 F. 2d 379, 383.

individually or other than through his designated representative if all of his bargaining has been through the association and he wishes to continue on that basis. Rather, the cases generally stand for the proposition that individual bargaining on certain matters mutually entered into by the union and an individual employer do not necessarily destroy a multi-employer unit. *Retail Clerks Union, No. 1550 v. N.L.R.B.* (D.C. 1964), 330 F. 2d 210, 213, 216, *cert. denied,* 379 U.S 828 (Pet. 10), may be contrasted with the facts in the present case. In that case there was no formal organization and no delegation of authority. Individual contract proposals were common, and separate agreements were executed by the individual employers. There was a history of individual variations in the contracts and negotiations. One employer's position, as it had a separate pension plan, was that it was not interested in an association-wide pension plan. The Court found that this did not constitute an illegal refusal to bargain.

> ". . . [A]n individual employer or an individual local might by timely action taken in good faith, reserve its position on a particular matter in such manner so as not to be bound at all events by what a majority of their associates might agree to."
>
> ". . . There, as here, the evidence showed such a mélange of group and individual negotiation and agreement, carried on over such a period of time, as to suggest a commonly accepted flexibility in the format of bargaining which would not automatically outlaw every departure from the fold."
>
> *Retail Clerks Union, No. 1550 v. N.L.R.B.*, 330 F. 2d 210, 213, 216.

There was no such mélange of group and individual negotiations in the present case but solely group negotiations.

Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America (2d Cir. 1965), 341 F. 2d 482, 488-489 (Pet. 10), was an action for damages for breach of contract and not a proceeding before the National Labor Relations Board although there had been a related NLRB case. The Court stated:

> "Multi-employer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently."
>
> *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of America,* 341 F. 2d 482, 488-489.

The Union's demand for bargaining in the present case was not made persistently, assuming it was made early and unequivocally. As pointed out above, after being notified specifically of the employer's position on the requirement of Association bargaining, the Union failed in the 1967 negotiations with the Association to even raise the issue. The right of an employer to issue plant rules is not a matter requiring specialized or individual treatment. The right of employers to issue rules is common to all employers and at least arguably a right under the Association contract. The only evidence of any previous demand for bargaining on plant rules was the demand by the Teamsters Union during the 1964 negotiations, which demand was on the Association [Tr. 75].

In *Western States Regional Council v. N.L.R.B.*, (D.C. 1968) ..... F. 2d ....., 68 LRRM 2506, 2508-2509, n. 3, No. 21,317, decided June 19, 1968 (Pet. 10), the court found a multi-employer lockout legal. The union had contended that the exclusions of certain items such as pensions, union security, health and welfare left for local negotiations was not consistent with the multi-employer unit. However such reservations were by mutual consent of the parties. At no time in the present case was there ever any such consent or agreement but to the contrary all negotiations were on the multi-employer basis and through the Association.

The Kroger Co. (1964), 148 NLRB 569, 573 (Pet. 10), a related case to *Retail Clerks Union, No. 1550 v. N.L.R.B., supra*, involved a representation question and whether a unit of one employer out of a multi-plant bargaining unit was appropriate for an election. The Board found that it was not and that although certain matters were left for local determination by the agreement of the parties this did not prevent the existence of a multi-employer unit. Again, there was mutual consent by the parties for reservation of certain matters to particularized individual negotiations.

Petitioner cites *N.L.R.B. v. Spun-Jee Corp.* (1967), 385 F. 2d 379, 383, to support its contention that where a single employer takes action peculiar to it, a request for bargaining made upon that employer is appropriate and creates a bargaining obligation on that employer. Petitioner seems to conclude that an exception to the general rule which protects the right of an employer to choose his own bargaining representative exists where the employer is represented by an association. Such a

conclusion is a misreading of the *Spun-Jee* decision. The case in relevant part provides:

> " 'Multi-employer bargaining does not altogether preclude demand for specialized treatment of special problems; what is required, if an employer or a union is unwilling to be bound by a general settlement, is that the particularized demand be made early, unequivocally and persistently.' * * *"
>
> *N.L.R.B. v. Spun-Jee Corp.*, 385 F. 2d 379, 383.

The case therefore establishes not an exception to the right of an employer to select a representative but merely that individual bargaining on certain matters is not necessarily destructive of multi-employer bargaining. The rule as regards an employer's choice of his bargaining is correctly stated in *Detroit Newspaper Publishers Association v. N.L.R.B.* (6th Cir. 1967), 372 F. 2d 569, 572:

> "After the withdrawal [of the union from the association] in the present case, each publisher would of course still have the right to be represented in separate bargaining by the Association. This is guaranteed by Section 8(b)(1)(B) of the Act and the unions may not interfere with the exercise of this right." (Bracketed material ours.)
>
> *Detroit Newspaper Publishers Association v. N.L.R.B.*, 372 F. 2d 569, 572.

Petitioner contends that there was no evidence that the Union in seeking individual bargaining was seeking fragmentation of the multi-employer unit. If the employer had acquiesced in this demand of the Union, it may not have destroyed the multi-employer unit. However, the issue was not peculiar to Respondent but in-

volved the basic right under the contract affecting all employers—the right of an employer to unilaterally issue plant rules. If the Union were successful in this case there would be bound to be an effect upon the other employers. The Union could presumably seek to demand individual bargaining on a multitude of matters because, of course, the Association is not an employer and does not act except through the individual members. Arguably every matter directly affects only individual employers.

There are many cases where unions have been found guilty of a refusal to bargain under Section 8(b)(3) by seeking to bargain with individual members of a multi-employer association unit or in seeking to break up an established unit. Thus in *International Union of Operating Engineers Local 825* (1964), 145 NLRB 952, the Board stated:

> "The Union and Weber likewise violated Section 8(b)(1)(B) and (3) of the Act by threatening to strike and by striking, individual members of the Association in order to force them to withdraw bargaining authority from the Association 'and to enter into individual contracts with the Union [Union at a time when] it was obligated to bargain for an associationwide agreement with the [Association].'"
>
> There can be no doubt that the Union might lawfully have struck the members of the Association in order to achieve its legal objectives, or for breaking a legal stalemate or impasse in its negotiations with the Association, but it is equally clear and well settled that it could not lawfully strike or otherwise coerce the Association employer-members with

an object of causing them to break off from the Association and execute individual contracts with the Union. * * *"

International Union of Operating Engineers Local 825, 145 NLRB 952, 962.

In *Hoisting & Portable Engineers Local 701* (1963), 141 NLRB 469, the union was held to have violated Section 8(b)(3) by attempting to break certain employers off from the multi-employer unit. The Trial Examiner stated in his opinion which was adopted by the Board:

"The whole theory of multiemployer bargaining is based on the premise that the employers who jointly have designated a single bargaining representative, are to be regarded as one employer for applying the rules governing bona fide bargaining. * * *"

Hoisting & Portable Engineers Local 701, 141 NLRB 469, 478.

(As the joint employers are to be regarded as one employer for rules governing bona fide bargaining, the unilateral promulgation of rules at the other companies is most persuasive as establishing waiver as argued below.)

In *Steamfitters Local No. 638* (1968), 170 NLRB No. 44, 67 LRRM 1615, the union sought individual agreements with members of a multi-employer unit and this was found to violate a union's obligation to bargain in good faith.[9]

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[9]See also *International Brotherhood of Teamsters Local* 324 (1960), 127 NLRB 488, remanded *N.L.R.B. v. International Brotherhood of Teamsters, Local 324* (9th Cir. 1961), 296 F. 2d 48.

What the Union is seeking here, assuming Respondent had acceded to its demand, would have been an individual bargain or agreement concerning the plant rules for Respondent without regard to any agreement or the lack of agreement with any of the other companies. The Trial Examiner did not consider the effect of the proposed order if it were followed by Respondent and barganining was undertaken in good faith. The Trial Examiner suggests that bargaining might be required "only to satisfy form" [R. 17] but if so, what is the point? If there are to be substantive and meaningful negotiations, what effect does this have on other members of the Association? Why should Respondent be treated differently from the other members of the Association, and is this not a fragmentation of association-wide bargaining which will be disruptive and harmful to the stability intended?

In another case, *Orange Belt District Council of Painters No. 48* (1965), 152 NLRB 1136, the Board was confronted with a situation where the issue was stated to be the bargaining duty of the union to one member of a multi-employer unit. In finding no duty to bargain the Trial Examiner stated in a decision adopted by the Board:

> "However, I am unable to subscribe to the theory that the Respondent failed in any bargaining *duty* owed to Kaufman. There was none. The Respondent upon this record was bound to negotiate with Tri-County for any agreement affecting Kaufman or his employees. Attempting to deal

directly with Kaufman rather obviously was inconsistent with the duty to bargain with Tri-County but that is not the thrust of the complaint. It owed no bargaining duty to Kaufman (other than as a member of Tri-County) and thus could not have failed to honor a non-existent obligation. The contract offered to Kaufman contained a requirement that Kaufman obtain a performance bond. I am supplied with much authority to the effect that an employer is not required to bargain about such a bond but the authority is irrelevant to the question here. *It still remains the fact that the Respondent had no duty to bargain with Kaufman, indeed, it seems to have had a duty not to do so.* * * *" (Emphasis added).

Orange Belt District Council of Painters No. 48, 152 NLRB 1136, 1141.

The demand by the Union in the instant case to withdraw from multi-employer bargaining as to Respondent's plant rules was not timely and unequivocal. As the Board stated in *W. S. Ponton* (1951), 93 NLRB 924, a case involving an attempt for individual bargaining by an employer:

"We have held that although an employer is free to abandon participation in group bargaining, this must be done at an appropriate time. To permit the Employer to alter its course from joint to individual action *during an existing contract would not, in our opinion,* make for that stability in collective bargaining which the Act seeks to promote. * * *" (Emphasis added).

W. S. Ponton, 93 NLRB 924, 926.

The same rules as to proper withdrawal apply to unions as to the employer members of a multi-employer unit.[10]

The Issuance of the Plant Rules Did Not in Any Real Sense Substantially and Unilaterally Change Working Conditions. Such Rules Were Mainly and Basically a Codification of Existing Rules Well Known to the Employees.

As established above, the rules are not basically, essentially or substantially new rules. They are merely a statement of rules of conduct generally expected of all employees in an industrial plant and from the evidence in this case most of them were well known to the employees. There was no substantive change in any term and condition of employment. The rules constituted what the employer expected of the employees, and as stated below, if and when the employer took action concerning such violations, the matter was subject to attack and testing under the grievance and arbitration proceedings. The issuance of the rules themselves did not substantially change any condition of employment.

The Board has upheld the unilateral posting of existing plant rules. In *Mason & Hughes, Inc.* (1949), 86 NLRB 848, the Board in reversing the trial examiner's finding of an 8(a)(5) violation, stated:

> "There is no showing in the record that the shop rules were different in any particular from

[10] *The Evening News Association* (1965), 154 NLRB 1494, aff'd. (6th Cir. 1967) 372 F. 2d 569; *Hearst Consolidated Publications, Inc.* (1965), 156 NLRB 210; *Adams Furnace Co., Inc.* (1966), 159 NLRB 1792.

> those which had previously been in effect. In these circumstances we are not persuaded that the mere posting of the existing rules constitute a refusal on the part of the Respondent (Company) to comply with its statutory duty to bargain."
>
> *Mason & Hughes, Inc.,* 86 NLRB 848, 850.

Similarly, if the work rules were established to protect the employer's time from activities inconsistent therewith, there is no refusal to bargain. *W. T. Smith Lumber Co.* (1948), 79 NLRB 606.

Petitioner suggests and gives as examples of rules which had not previously been in force rules prohibiting certain forms of gambling such as card playing and large football pools, collections and the alleged right to refuse to work overtime (Pet. 7). Gambling, including card playing for money, is a violation of state law as are football pools.[11] How publishing a rule to this effect could constitute a substantial change in employment, we do not understand. As to the collections, the evidence was that this was one of the areas that the employer clarified for the employees in response to a question [Tr. 85]. There was no evidence

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[11]"Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employe, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit or other representative of value, and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." California Penal Code §330.

that the Respondent was taking away any right previously enjoyed.

As to the rule against refusing to work overtime, the Union witness merely stated that he did not know that he could refuse overtime [Tr. 85]. If there was a right to refuse under the collective bargaining agreement, and the Trial Examiner contends there arguably may have been, this is all the more reason why the matter should have been left to the grievance and arbitration procedures rather than being presented to the Labor Board [Compare R. 18].

The proposed penalties included in the rule books were, of course, not self-executing (Pet. 7). If an employee were discharged or otherwise disciplined for violation of any rule, the matter would be subject to the grievance and arbitration provisions and particularly the just cause provision. This is where any dispute concerning the effect of the issuance of the plant rules belonged. If action was taken against any employee for any violation there was a ready remedy available to it assuming the Union did not wish to test the question of the issuance through the grievance and arbitration procedures.

Petitioner incorrectly states that the Respondent "flatly refused to enter into any discussion of any kind with the Union about the rules." [Pet. 9]. This is contrary to the evidence. Respondent's expressed willingness to discuss the rules, to clarify the rules (although not to "bargain" on them), has been present since the rules were first issued. Other unions availed themselves of this right and the questions were easily and promptly resolved to the satisfaction of the other unions without any grievances or demands for bargaining. In fact,

at the time of the promulgation of the rules Respondent explained and clarified the rules to the employees represented by the Machinists Union.

Similarly, the Petitioner states "the facts show a total refusal to bargain about the rules." [Pet. 9]. This is not correct and has never been the position of the employer. The position of the employer is and has been throughout that it did not have to bargain on the basis of the request made by the Union in this case. There is no evidence to conclude that a timely request in negotiations upon the Association would not have been honored. The refusal was not a total refusal but a refusal only because of the manner and timing of the demand by the Union.

N.L.R.B. v. Hilton Mobile Homes (1967), 155 NLRB 873, enforcement denied in part (8th Cir.), 387 F. 2d 7, 12 (Pet. 7), as decided by the Board, was the only case cited by the Trial Examiner [R. 18]. The Board had found an unlawful refusal to bargain in the unilateral issuance of a rule prohibiting the taking of tool boxes home. The Court in fact found:

> "In view of the facts: that the record does not support a finding that the tool box rule was a subject of mandatory bargaining; that there is substantial evidence in the record that the parties had bargained to an impasse on the issue; and that there is no reason for the Board's disparate treatment of the February and April rules, we decline to enforce the Board's order insofar as it relates to the tool box issue."
>
> *N.L.R.B. v. Hilton Mobile Homes,* 387 F. 2d 7, 12.

Respondent's action in isolation. As the obligation of the Union was to bargain through the Association and on a multi-employer basis, so also must the question of waiver be considered on an industry-wide basis. The practice of the companies to issue plant rules under the same contract constitutes a waiver of the right to demand bargaining concerning such issuance at least during the contract.

In *Pacific Coast Assn. of Pulp & Paper Manufacturers* (9th Cir. 1961), 133 NLRB 690, 691, n. 2, enf'd 304 F. 2d 760, 763-765 (Pet. 12), over a period of years the parties had agreed not to discuss pensions on a multi-employer basis but rather on an individual basis. The union then demanded to negotiate during regular contract negotiations with the Association concerning pensions rather than with the individual companies. The Board found that this was a proper and enforceable demand and that the previous waiver did not continue into the current negotiations. The Board adopted the decision of the Trial Examiner who stated:

> "The closest analogy that comes to mind is where an individual employer and the representative of his employees, agree that for the term of a contract or for some indefinite period, certain matters germane to collective bargaining, such as merit wage increases, be omitted from the bargaining agenda. This would not, and indeed could not, mean that an agreement had thereby been reached that the employer no longer had the authority to bargain in such matters or that he might not at some future appropriate time, on request, be required to exercise that authority."
>
> *Pacific Coast Assn. of Pulp & Paper Manufacturers,* 133 NLRB 690, 698.

We are not contending that the Union is forever bound to Association bargaining or by its waiver of the right to object under the contract to the issuance of these plant rules. In any new negotiations, when the contract is open, the Union may be free to withdraw from Association bargaining and demand individual bargaining on the rules or any other matter or to bargain on an Association-wide basis concerning plant rules.

Support for the employer's position is found in the recent subcontracting cases holding that a history of subcontracting may prevent a finding of a refusal to bargain.

In *Westinghouse Electric Corp.* (1956), 150 NLRB 1574, subcontracting was a long standing practice and the union had sought restrictions that were rejected by the employer. The Board set forth the following test to determine when an employer can act unilaterally:

> "In sum—bearing in mind particularly that the recurrent contracting out of work here in question was motivated solely by economic considerations; that it comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly in kind or degree from what had been customary under past established practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at *general* negotiating meetings—for all these reasons cumulatively, we conclude that Respondent did not

violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions." (Emphasis added).[12]

Westinghouse Electric Corp., 150 NLRB 1574, 1577..

Petitioner sought to distinguish these cases on various grounds (Pet. 13-14). For example, he stated some of the prior practices in the subcontracting cases involved thousands of contracts over a yearly period and "was a constant fact of life for the unit employees". Plant rules are also a constant fact of life and no employer could long exist without standards of conduct whether they be published in a rule book, oral or on an *ad hoc* basis. Plant rules affecting daily conduct are something that, contrary to Petitioner's contention, "the employees had to cope with on a frequent basis" (Pet. 14).

Petitioner also contended that one of the rationales of the subcontracting cases was the absence of a significant detriment to the unit employees, the presence of contractual provisions and the opportunity to bargain subsequently afforded. As stated above, the plant rules in no real, substantial or significant sense restricted the employees' actions in important areas. *District 50, United Mine Workers, Local 13942 v. N.L.R.B., supra* (Pet. 14). To take the extreme example, certainly the publication of the rule against theft did not interfere with any previously unfettered right, nor, for that matter, did the rule on employees punching another employee's time card. Practically all of the rules were

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[12]See also: *Kennecott Copper Corp.* (1964), 148 NLRB 1653; *Motorsearch Co. & Kems Corp.* (1962), 138 NLRB 1490; *Shell Oil Co.* (1964), 149 NLRB 283.

standard, well known and well accepted rules and so testified to by the Union witnesses [Tr. 37-47].

The only rules that Petitioner enumerates as changes are the rules relating to gambling, to collections among employees and to the obligation to work overtime if requested. As stated, gambling is against the State law in any event with or without a plant rule. It may well be questioned whether the alleged right of employees to take up collections for other employees is a mandatory subject for bargaining but in any event any modest limitation on it could hardly be a significant detriment. Employers generally are considered to have the right to require employees to work overtime. Petitioner suggests that the contract arguably protects such a right (Pet. 7). This, of course, leads to the argument that any question should have been submitted to the grievance procedure where it could have been properly tested.

The question of whether the contracual provisions empowered the employer to issue plant rules is a matter that can best be solved under the grievance procedure. The more that the Board or a court injects itself into this area, the more confused the issue of what is the proper forum will be. Finally, there was ample opportunity for the Union to bargain at a subsequent time about the right of an employer to issue plant rules. Surprisingly enough the Union failed to demand to negotiate on the issuance of plant rules in the 1967 negotiations.

The contractual provisions relating to safety rules and just cause are set out in Petitioner's Brief (Pet. 15). The term "safety rule" is used in the agreement itself and clearly contemplates such rules. The just

cause provision indicates if it would not otherwise be clear that the employer takes the action to establish certain standards as to what he considers to be just cause. As stated below, his action in connection with such rules or standards are subject to the grievance procedure. Publication of the rules did nothing to increase the right of the Respondent beyond that already provided in the agreement.

As Petitioner recognizes, a just cause provision in an agreement is a standard general provision appearing in most collective bargaining agreements (Pet. 16). Petitioner suggests that the term "just cause" does not give the right to the employer to decide in the first instance what is just cause, or to publish rules concerning his beliefs. Petitioner states:

> "Rather, the phrase, 'just cause,' would clearly comprehend only what had traditionally been agreed to be a ground for discharge in the plant in the past, as found in the express terms of the contract, the prior written plant rules, or the practice of the parties." (Pet. 17).

It would be remarkable if the term "just cause" was static and limited by express terms of the agreement, prior plant rules or practice or what had been agreed upon. Conditions and events constantly change and occur. The reason for the extensive use of the term "just cause" is to give the employer latitude in determining what is just cause in particular situations, subject to review and affirmance or reversal by an arbitrator. Plant rules provide guidance to employees as to the employer's position on just cause prior to taking action.

The alleged absence of specific language expressly authorizing the unilateral issuance of plant rules does not of course imply that Respondent does not have such right. Absent a collective bargaining agreement or a bargaining representative, an employer undoubtedly has the right to unilaterally issue plant rules. The collective bargaining agreement limits and controls the rights that management otherwise has. However many arbitrators in interpreting collective bargaining agreements rely on the reserved rights concept and hold that an employer retains the rights that it previously had subject to any limitations or restrictions contained in the agreement. As set forth in the following section of this brief, at the very least this is an argument that should have been addressed to an arbitrator and answered by him.

Arbitrators charged with interpreting and applying collective bargaining agreements generally accept and recognize the right of the employer to issue plant rules even without specific contractual authority. We submit that the reasoning of arbitrators under collective bargaining agreements is persuasive as to whether the employer had a right under the contract to issue such rules. As stated below, the grievance and arbitration procedure was the one agreed to by the parties and should have been followed in this case.

Arbitrator I. Robert Fernberg in *Bethlehem Steel Co.* (1954), considered a series of thirty-seven rules with accompanying penalties unilaterally promulgated by the company:

> "[I]t is undoubtedly true that Management has the right to issue rules such as here were promulgated, and opposition thereto by union repre-

sentatives finds no support in any valid theory of labor relations or in the contract between the parties hereto. The rules here issued constitute merely a series of acts or offenses which the Company stated it would consider as justifying disciplinary action, and sets forth the penalties to be imposed for each successive offense. Under the agreement between the parties, the Company is given the right to discipline or discharge employees for 'just cause.' The rules constituted merely an announcement by the Company of what it would consider 'just cause.' Whether any such alleged offense actually is 'just cause' may be tested by the Union through the grievance procedure when and if it has been utilized by the Company as the basis for disciplinary action. Until that time, however, the rules serve a salutary purpose in indicating in advance to the employees the attitude of the company with regard to certain conduct."

(*Contracts and Unfair Labor Practices Bernard Dunau,* 57 Col. L.R. 52, 79).

"It is generally held by Arbitrators that in the absence of restrictions or prohibitions in the Agreement, the Company may unilaterally establish and put into effect working rules governing working conditions, provided the same are not unreasonable, capricious or constitute an abuse of discretion on the part of Management. Such rules are an aspect of Management's direction of working forces and production. In most instances, such rules are neither included n the Labor-Management Agreement nor made the subject of bargaining."

Corhart Refractories Co. (1963), 40 LA 898, 901-902.

"Absent any specific clause in the contract obligating the Company to negotiate, bargain or consult with the Union before instituting any safety rules, the management clause implicitly empowers the Company to institute [them] unilaterally.

* * * * *

"Whether or not the Company is obligated to bargain, must be judged in the context of the specific circumstances and the relevant contractual language pertaining to each such new condition of employment. And it has already been shown that both under the contract and in the light of precedent, the Company has the right to institute safety rules unilaterally. To be sure, there is nothing to bar the Union from changing the *procedure* of instituting safety rules by getting agreement thereto from the Company during contract negotiations or at other times. But no such agreement has so far been obtained. In fact, the Union has never ever requested such a procedural change during the various contract negotiations in the past, although it has frequently asked for changes in specific safety rules during these negotiations."

Linde Co. (1960), 34 LA 721, 724-725.[13]

The "clear and unmistakable" test enunciated by the Board and some courts in determining whether there is a waiver of bargaining rights may be proper and in furtherance of the policies of the Act in many cases

[13]See also: *Dayton Steel Foundry Co.* (1958), 31 LA 865, 869; *Sylvania Electric Products, Inc.* (1958), 32 LA 1025, 1027; *Gravely Tractors, Inc.* (1958), 31 LA 132, 135-136; *Butler Manufacturing Co.* (1968), 50 LA 109.

(Pet. 15-16). However, we submit that the evidence is sufficient to require a finding of waiver in the instant case based upon the practice of the parties, the contractual provisions and the availability of the grievance and arbitration provisions.

Any Question of Waiver or the Right of the Respondent to Issue Rules Should Have Been Left to the Grievance and Arbitration Procedures Available.

The Union had the option of testing the right of Respondent to issue the rules through the grievance and arbitration procedure [G. C. Exh. 3]. It also had the right to wait until action was actually taken against an employee and then have the propriety of the action reviewed through the grievance procedure. The rule book itself recognizes that the rules are subject to the agreement.

> "The foregoing rules are subject to the provisions of State and Federal laws and *any applicable collective bargaining agreements* which employees must observe at all times." [last page, G. C. Exh. 4] (Emphasis added).

There may be cases where the Board can act and should act even though there is some arguable remedy available under the collective bargaining agreement. The cases cited by Petitioner reflect the policy of the Board and the courts as to the proper balance and accommodation between the two remedies (Pet. 19).

The fact that the matter has not now been submitted to arbitration is, to our mind, irrelevant.[14] What we are contending is that it should have been referred to the grievance and arbitration provision in the first instance. This is and has been our position and if the Board had acted in this manner there would be no duplication or delay. We hardly believe that the delay caused by the Board's assumption of jurisdiction is a compelling reason to find that the Board processes were properly used. If the position, advanced by the Respondent from the earliest stages of the proceeding, had been adopted there would have been far less delay than in the route taken by the Board.

We submit that an arbitration decision as to whether the Respondent had the right under the contract to issue the rules would put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act. We do not believe that it was ever intended that the Board should be involved in cases which are properly grievance matters during the term of a collective bargaining agreement. It is hard to see how the Petitioner can contend that an arbitrator's decision showing a right to issue these rules could be "repugnant to the purposes and policies of the Act." (Pet. 20). These purposes, among others, are to have matters and controversies resolved expeditiously, without delay to the parties and in the forum agreed. It is obvious that the question would have been more expeditiously handled through the grievance and arbitration procedures than through the Board.

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[14]Compare *N.L.R.B. v. Huttig Sash & Door Co.* (8th Cir. 1967), 377 F. 2d 964, 970 (Pet. 18, 19); *N.L.R.B. v. Acme Industrial Co.* (1967), 385 U.S. 432.

The other grounds argued by Respondent as defenses for its alleged refusal to bargain would never have arisen or would have been resolved through grievance and arbitration. Thus the issue of the demand on the proper party would not have even been involved. Grievances are on an individual company basis [G. C. Exh. 3, Article VI]. The questions of waiver by practice and under the contractual language would be decided by the arbitrator in interpreting whether there had been a violation of the contract.

The Board Improperly Refused to Reopen the Record to Admit the Additional Evidence Establishing the Failure of the Union to Demand Bargaining Through the Association on the Issuance of Plant Rules.

In the 1967 negotiations, long after the Union had been clearly and specifically advised that bargaining had to be on an Association basis and that the Association was the designated and proper employer representative, the Union was engaged in regular contract negotiations with the Association. The Union made no effort or attempt to bargain concerning plant rules by demand either to Respondent or the Association.

The Board has recognized in analogous cases the obligation on the union to make a proper and timely demand for bargaining. Thus in *E-Z Mills Inc.* (1953), 106 NLRB 1039, 1047, the union alleged that the unilateral closing of the plant cafeteria constituted a refusal to bargain. The Trial Examiner stated in a decision adopted by the Board in dismissing the complaint:

> "Since the Union was the representative of the Bennington employees, this unilateral action of

the Respondent would ordinarily constitute a refusal to bargain. However, as has been seen, the parties met and negotiated thereafter. The Union did not indicate at any of the bargaining sessions that it wished to bargain about the matters, or to have the action withdrawn. Indeed, at one of the meetings, one of the employees specifically brought up the subject of the cafeteria closing and the credit union withdrawal, but the Union's regional director, and its principal negotiator, Salerno, indicated that the Union did not wish to discuss the subjects, saying that there were 'more important things than grievances' to discuss. The record does not reveal that the Respondent refused to talk about the matters. It is consequently found that these questions were waived by the Union, or that it acquiesced to the Respondent's action, and that there was therefore no refusal to bargain respecting them."

E-Z Mills Inc., 106 NLRB 1039, 1047.

Similarly, in *Justesen's Food Stores, Inc.* (1966), 160 NLRB 687, the employer unilaterally installed an automatic meat wrapping machine in his store. In finding that there was no violation of the Act, the Board stated:

"'In agreeing with the Trial Examiner's dismissal of that part of the 8(a)(5) allegation which concerns unilateral installation by the Respondents of a wrapping machine and resultant layoff of two employees in the Bakersfield unit, we do so because the Union, Party to the Contract and Charging Party here, failed to protest. Although advised of Respondents' unilateral action in December 1964,

immediately after the layoffs of Couch and Manuel, the Union's sole protest came in June 1965 when it filed a first amended charge alleging that its bargaining contract with the Respondents required negotiations when 'new' methods were introduced. At no time while attempting to bargain for a new contract—including a meeting with the Respondents in January 1965—did the Union raise this issue or in any way request the Respondents to bargain about it. At the hearing it alluded to the problem during a record discussion of the contract, but now, in its exceptions and brief, the Union has not urged that the Respondents' unilateral action exceeded the authority conferred by the new methods clause of the contract then in effect. In the circumstances we cannot find that the Respondents failed to bargain in good faith with respect to the installation of automatic machinery in the meat department and the layoff of employees.' "

Justesen's Food Stores, Inc., 160 NLRB 687, 688.[15]

The Petitioner contends that the Board's ruling was correct and first suggests that there is relevance to the fact that the demand on other than the proper representative was only one defense urged (Pet. 21). A review of the grounds advanced shows that none of the other grounds would impede making the demand on the Association during contract negotiations. The waiv-

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[15]See also: *Lakeland Cement Co.*, (1961), 130 NLRB 1365; *American Federation, Etc. v. National Labor Rel. Bd.*, (5th Cir. 1952), 197 F. 2d 451, 454; *U. S. Lingerie Corporation* (1968), 170 NLRB No. 77, 67 LRRM 1482; *L. J. Dreiling Motors Co.* (1967), 168 NLRB No. 67, 67 LRRM 1071.

er by practice would not operate to prevent the Union at any time in the future from negotiating on plant rules but only during the term of the contract. The same is true with the contractual provisions constituting waiver. Obviously, the same is true with the requirement that the Union process the matter through grievance and arbitration before resorting to the Board. If the contract is open for negotiations, the question of the right to issue plant rules is open for negotiations too and is, as admitted, a mandatory subject for bargaining if the demand and timing are proper.

Petitioner is just wrong when it asserts that there was a "total refusal to bargain" (Pet. 21). The Union demanded bargaining; the employer refused asserting it was not obligated to do so. There is no evidence of any request by the Union for the employer to set forth its grounds and the first occasion to do so was as part of the NLRB proceeding.

Petitioner cites various cases to the effect that a claim by Respondent that it has ceased and desisted from committing an unfair labor practice is not an adequate remedy nor a barrier to enforcement (Pet. 21). These cases are not relevant for, as stated and established above, the employer had not committed an unlawful refusal to bargain. The only difference between the time the Union first made its demand to bargain and the hearing is that at the hearing the employer explicated its reasons. The lack of obligation was the same at both times. Respondent does not now and it has never contended that it had no obligation to bargain under any circumstances. It was not confronted with any such circumstances but only with an improper and untimely demand.

Conclusion.

For the reasons set forth above, we respectfully submit that this Court should issue an order denying enforcement.

Respectfully submitted,

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Miller Brewing Company.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE TAIL RANCH, Appellants, vs. WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States of America, and STEWART L. UDALL, Secretary of Interior of the United States of America, Appellees.	NO. 22699

APPELLANTS' OPENING BRIEF

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-vs-	)	No. 22699
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Appellees.	)	

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I N D E X

TABLE OF CASES

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

I

This is an appeal from a decision of a District Manager of the Phoenix District Office of the Bureau of Land Management and the decision of Stewart L. Udall, Secretary of the Interior, United States of America, concerning a purported cancellation of grazing allotments of the Appellants. Section 10 of the Administrative Procedure Act, Title 5, U.S.C., Section 109 (a), which said Section is also Title 5, U.S.C.A., Section 702, and reads as follows:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

provides statutory authority for jurisdiction in the federal courts.

II

This appeal involves the basic question whether Public Land Order No. 848, dated July 1, 1952, Volume 17, Federal Register, page 6099, provides a legal basis for cancellation of grazing allotments and effective withdrawal of public lands in excess of 5,000 acres by the U. S. Department of Defense after the enactment of Title 43, U.S.C.A., Sections 155, 156, 157 and 158. Public Land Order No. 848 provides the military with certain rights to withdrawal, subject, however, to valid existing rights; Title 43, U.S.C.A., Sections 155, 156, 157 and 158 provide that no withdrawals in excess of 5,000 acres can be made by the military without first obtaining approval from Congress for any such withdrawal, reservation or restriction of and utilization by the

Department of Defense for defense purposes the public lands of the United States of America.

III

Paragraphs I and II of Plaintiffs' Amended Complaint on Appeal from Administrative Decision, (T.R. page 1 and 2) set forth the necessary allegations to show the existence of the requisite jurisdictional allegations.

STATEMENT OF THE CASE

Appellants and their predecessors in interest have for many years occupied the public land in question as a lessee of the United States of America under what is commonly referred to as a Federal Grazing Allotment. The total acreage involved is approximately 136,680 acres divided between two ranches, one ranch has 79,880 acres, which is the subject

of this controversy, the other 56,800 acres. These lands were withdrawn from larger ranch units during World War II for purposes of desert training but were restored to the Bureau of Land Management as federal allotments after the termination of hostilities, and the leases of Appellants' predecessors in interest continued. On July 1, 1952 Public Land Order 848 was signed allowing certain withdrawal rights, but this Order was "subject to valid existing rights" which included the grazing rights of the Appellants. The Department of the Army recognized it did not obtain these rights under Public Land Order 848, and on the same date, July 1, 1952, the Department of the Army and the predecessors in interest of the Appellants entered into annual "Lease and Suspension Agreements",

under which Appellants' predecessors in interest leased their grazing rights to the army. These leases continued until July 1, 1958. The Department of the Army, however, failed to pay the consideration provided to be paid by the Lease and Suspension Agreements and when a Lease and Suspension Agreement was presented to Appellants for signature for a term beginning July 1, 1952 and ending July 1, 1962, (T.R. page 101 to 108) Appellants refused to sign said Agreement. During the entire time that the Lease and Suspension Agreements were in effect no attempt was made to cancel the grazing privileges of the Appellants or their predecessors in interest, each party recognizing that Appellants still retained the grazing rights. The Lease and Suspension Agreements allowing the Department of Defense to

utilize the acreage leased to Appellants' predecessors in interest was the only way the Department of the Army could stop Appellants'predecessors in interest from exercising their grazing rights thereon. During this period of time there was no attempt to cancel the leases on this acreage and the Bureau of Land Management recognized at all times that the Appellants had the leases on the land and issued the annual permits.

Appellants refused to sign the Lease and Suspension Agreement dated June 17, 1958, (T.R. 101-108) because it did not provide for the consideration which had previously been agreed to between the Corps of Engineers acting on behalf of the Army and the Appellants, and since Appellants had not been paid for any of the prior years ' Lease and Suspension Agreement. The Army refused to provide a

Lease and Suspension Agreement which incorporated the terms previously agreed to and failed to make any payments on the previous Lease and Suspension Agreement, and Appellants continued to refuse to lease its grazing rights to the Army and refused to sign a new Lease and Suspension Agreement. The Department of the Army thereupon requested that Appellants' leasehold interest be condemned and an action was filed in condemnation, and an order for delivery of possession issued by the Court January 14, 1958.

For more than eight years after Public Land Order 848 was signed on July 1, 1952, the Bureau of Land Management continued to lease these lands to Appellants and its predecessors in interest.

Thereafter, and on July 14, 1960, Warren J. Gray, District Manager, served

upon Appellants Eagle Tail Ranch and H. D. Mollohan, a notice of cancellation of the grazing allotment setting forth the fact that the lands had previously been withdrawn under Public Land Order No. 848 dated July 1, 1952, and notifying Appellants of the cancellation of the allotment as to the area included in the Lease and Suspension Agreement, (T.R. 35-40) although said Order expressly made the withdrawal subject to existing rights.

The decision of the District Manager was appealed through the administrative procedure of the Bureau of Land Management to the Secretary of the Interior, and when sustained by the Secretary of the Interior, this action was commenced in the District Court to review the validity of the actions of the Bureau of Land Management. Until this Motion for Summary Judgment was filed, the Department of the

Army took the position that the condemnation case, which by then had been refiled for a second five-year term, and which attempted to condemn the Appellants' lease to the public lands in question was controlling and that the government was legally holding the lands pursuant to said condemnation order. When the Plaintiffs' and Defendants' Motion for Summary Judgment was submitted this position was abandoned and the original position was again taken that the action of the Bureau of Land Management was supported by Public Land Order No. 848.

It is the position of the Appellants that Title 43, U.S.C.A., Sections 155, 156, 157 and 158 provide the only means by which the Department of Defense can withdraw and reserve for defense purposes the grazing rights of

these Appellants in the withdrawn public lands of the United States, and the Public Land Order No. 848 did not provide any right for withdrawal of or cancellation of Appellants' lease rights with the Bureau of Land Management.

This appeal presents only one basic question: Does the Congressional enactment contained in 43 U.S.C.A., Sections 155, 156, 157 and 158 constitute the basis upon which the Department of Defense could in July of 1960, withdraw Appellants' grazing rights in public lands for defense purposes, or did Public Land Order 848 withdraw these rights on July 1, 1952.

SPECIFICATION OF ERRORS

I

The Court erred in denying Appellants' Motion for Summary Judgment in that the

attempted cancellation of Appellants' grazing permits are null and void as a matter of law, since the purported cancellations were in fact withdrawals of Appellants' validly existing lease rights from the public domain for use as a military reservation without meeting the requirements of 43 U.S.C.A., Sections 155, 156, 157 and 158, and contrary to the express reservation of such rights in Appellants under Public Land Order 848, dated July 1, 1952.

II

The Court erred in granting Appellees' Motion for Summary Judgment for the reason that 43 U.S.C.A., Sections 155, 156, 157 and 158 provide the only basis upon which Appellants' validly existing lease rights could be cancelled and was contrary to the express reservation of such rights in Appellants under Public Land Order No. 848,

dated July 1, 1952; and the revoking of the allotment pursuant to the Taylor Act provisions, 43 U.S.C. 1958 Ed., Section 315 (b), constituted a withdrawal of validly existing lease rights from the public domain for use as a military reservation. The finding of law by the Court that Public Land Order No. 848, dated July 1, 1952, is still in effect is in error as are the findings of fact which were made in support of this conclusion of law, if from this we infer that said Land Order provided a basis for cancellation of Appellants' validly existing lease rights.

ARGUMENT

The actual question involved in this appeal is, as stated above, very limited in scope. The Appellee Warren Gray's purported cancellation of the grazing rights

of the Appellants was based solely upon Public Land Order No. 848, dated July 1, 1952. By giving this cancellation notice the Bureau recognized that Public Land Order No. 848 did not withdraw the existing grazing rights on the property and in the cancellation letter to Eagle Tail Ranch, dated September 15, 1959, (T.R. 30 and 31) Mr. Gray stated as follows:

> "This office has been advised by our Director that the public grazing lands administered by this office, which were included within the boundaries of the Yuma Test Station, were withdrawn from further grazing use except to the extent authorized by the terms of the then outstanding leases, licenses or permits. The withdrawal order further provided that upon expiration the existing leases, licenses and permits on the withdrawn public lands would not be subject to renewal.
>
> In view of the public withdrawal order provisions you are hereby notified that the public lands within your grazing allotment which were included within the boundaries of the Yuma Test Station are cancelled from your grazing allotment."

The statements made by Mr. Gray in said letter are completely false in that the said Public Land Order No. 848 makes no mention whatsoever of withdrawal of grazing rights and in fact the only reference made is a reference which makes said withdrawal subject to valid existing rights.

For convenience in reference by the Court there is reproduced below the said Public Land Order No. 848 as set forth in 17 Federal Register, page 6099-6100:

FEDERAL REGISTER

Tuesday, July 8, 1952 6099

Appendix—Public Land Orders

[Public Land Order 848]

ARIZONA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE ARMY IN CONNECTION WITH YUMA TEST STATION

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the public lands in the following-described areas in Arizona are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Army in connection with the Yuma Test Station:

GILA AND SALT RIVER MERIDIAN

T. 1 N., R. 18 W.,
Secs. 6, 7, 18, 19, 30, and 31.
T. 2 N., R. 19 W.,
Secs. 6, 7, 18, 19, 30, and 31.
T. 1 N., Rgs. 20 and 21 W.
T. 2 N., Rgs. 20 and 21 W., unsurveyed.
T. 1 N., R. 22 W., unsurveyed.
Tps. 2 and 3 S., R. 14 W., unsurveyed.
Tps. 4 and 5 S., R. 14 W.
T. 6 S., R. 14 W.,
Secs. 1 to 21, inclusive;
Secs. 28, 29 and 30.
Tps. 5 and 6 S., R. 15 W.
T. 7 S., R. 15 W.,
Secs. 5, 6 and 7.
Tps. 5 and 6 S., R. 16 W.
T. 7 S., R. 16 W.,
Secs. 1 to 12, inclusive;
Secs. 14 to 20, inclusive.
T. 6 S., R. 17 W., unsurveyed.
T. 7 S., R. 17 W.,
Secs. 1 to 24, inclusive;
Secs. 26 to 30, inclusive;
Sec. 31, N½;
Sec. 32, N½.
T. 6 S., R. 18 W., unsurveyed.
T. 7 S., R. 18 W., part unsurveyed,
Secs. 1 to 33, inclusive;
Sec. 34, N½;
Sec. 35, N½;
Sec. 36, N½.
T. 8 S., R. 18 W., part unsurveyed,
Secs. 4 to 9, inclusive;
Sec. 17, N½;
Sec. 18.

6100

T. 5 S., R. 19 W., unsurveyed,
Secs. 5 to 8, inclusive;
Secs. 17 to 20, inclusive;
Secs. 29 to 32, inclusive.
Tps. 6 and 7 S., R. 19 W., unsurveyed.
T. 8 S., R. 19 W.,
Secs. 1 to 18, inclusive, unsurveyed;
Sec. 19, N½, SE¼;
Secs. 20 to 23, inclusive;
Sec. 24, W½;
Sec. 27, N½;
Sec. 28, N½.
T. 1 S., R. 20 W.
Tps. 2, 3, 4, 5, and 6 S., R. 20 W., unsurveyed.
T. 7 S., R. 20 W., part unsurveyed,
Secs. 1 to 28, inclusive;
Sec. 29, N½;
Sec. 30, N½;
Sec. 33, E½;
Secs. 34, 35, and 36.

T. 8 S., R. 20 W., part unsurveyed,
Secs. 1 and 2;
Sec. 3, N½;
Sec. 11, N½, SE¼;
Sec. 12;
Sec. 13, N½, SE¼.
T. 1 S., R. 21 W.
Tps. 2, 3, and 4 S., R. 21 W., unsurveyed.
T. 5 S., R. 21 W.,
Secs. 1 to 6, inclusive;
Secs. 8 to 16, inclusive;
Secs. 21 to 28, inclusive;
Secs. 32 to 36, inclusive.
T. 6 S., R. 21 W., part unsurveyed,
Secs. 1 to 5, inclusive;
Secs. 9 to 16, inclusive;
Secs. 21 to 28, inclusive;
Secs. 32 to 36, inclusive.
T. 7 S., R. 21 W.,
Secs. 1 to 4, inclusive;
Secs. 5, 8 and 17, those parts east of a line parallel to and ¼ mile east of Gila Canal;
Secs. 20 to 24, inclusive;
Secs. 9 to 16, inclusive;
Sec. 25, N½;
Sec. 26, N½;
Secs. 27, 28, 29, 32, 33 and 34.
Tps. 1, 2, and 3 S., R. 22 W., unsurveyed.
T. 4 S., R. 22 W.,
Secs. 1 to 30, inclusive;
Sec. 36.

The area described including both public and non-public lands aggregate approximately 892,570 acres.

This order shall take precedence over, but not otherwise affect, (1) the order of July 30, 1941, of the Secretary of the Interior establishing Arizona Grazing District No. 3, and (2) the orders of January 31, 1903, October 6, 1921, and March 14, 1929, of the Secretary of the Interior and the order of May 5, 1950 of the Bureau of Reclamation withdrawing lands for Reclamation purposes so far as such orders affect any of the above-described lands: *Provided, however*, That the Bureau of Reclamation shall have the right to construct and maintain storm water protective and drainage works on the lands withdrawn for reclamation purposes, and the Bureau of Reclamation or its permittees shall have the right to search for and remove construction materials on the lands withdrawn for reclamation purposes, subject to the prior written approval of the Commanding Officer of the Yuma Test Station.

It is intended the lands described herein shall be returned to the administration of the Department of the Inte-

rior when they are no longer needed for the purpose for which they are reserved.

R. D. SEARLES,
Acting Secretary of the Interior.

JULY 1, 1952.

[F. R. Doc. 52-7383; Filed, July 7, 1952; 8:45 a. m.]

At all stages of the appeals and in their Motion for Summary Judgment, Appellees have set forth in detail the law supporting the right of the Bureau of Land Management to cancel grazing allotments. Assuming that the Bureau has all of the rights which have previously been argued by the Appellees, this does not in any way touch upon the question of law involved in this appeal, since cancellation of grazing rights for other reasons would not be applicable to the present proceeding which is an attempted

cancellation for withdrawal purposes for the Department of the Army as described in the September 15, 1959 notices of cancellation. The only basis for the cancellation was Public Land Order No. 848 which expressly reserved the valid existing grazing rights of the Appellants from the withdrawal by the Department of the Army.

In Appellees' memorandum opposing Appellants' Motion for Summary Judgment, Appellees have taken the position that once the Public Land Order was signed on July 1, 1952, that Appellants had no further right in or to said land.

All the facts are to the contrary and can be summarized as follows:

1. The serving of the letters of September 15, 1959 and July 14, 1960 purporting to cancel said grazing leases constituted a recognition by the Appellees

that the Appellants had these rights at all times prior to June 30, 1960, the date of the purported termination. (T.R. 29-39)

2. The negotiation and signing of Lease and Suspension Agreements with the Appellants' predecessor in interest by the Department of the Army, effective on July 1, 1952, the exact same date that the Public Land Order became effective, constituted an immediate recognition by the Department of the Army that the grazing rights were not included in the withdrawal order and that a separate means would have to be taken to acquire this interest. (T.R. 51,55)

3. The filing of the condemnation action in 1958 for a term of five (5) years and the refiling of said action in 1962 for an additional five (5) year term constituted an express recognition again

by the Department of the Army that the Public Land Order did not provide it with the necessary withdrawal of the grazing rights of the Appellants. It is to be noted that the condemnation actions were brought under the general condemnation statutes of the United States and expressly included the entire 892,570 acres of federal lands. (T.R. 49-50, 56-57)

The key question then is not whether the Bureau of Land Management has an abstract right to cancel grazing permits or leases as argued by the Appellees in their Motion for Summary Judgment, (T.R. 17, 18, 19 and 20) but whether the Bureau of Land Management had a right to cancel the Appellants' grazing rights on the sole basis that the grazing rights had previously been withdrawn by Public Land Order No. 848 (T.R. 29-39).

It was not by chance that Public Land Order No. 848 does not give the United States any right to withdraw the lands from grazing use. Public Land Order No. 848 is an order based upon the authority of Executive Order No. 10355, dated May 26, 1952, 17 Fed. Reg. 4831. This Executive Order entitled "Delegation of Authority" delegated to the Secretary of Interior the authority given the President to withdraw lands of the public domain from settlement, location, sale or entry for water power sites, irrigation, classification of lands, or other public purposes to be specified in the Order of Withdrawals. This Executive Order was authorized by statute, 43 U.S.C.A. 141, and expressly limited the withdrawal of the public domain to the purposes set forth above. Section 141 is reproduced below for the convenience of the Court:

Section 141. Withdrawal and reservation of lands for water-power sites or other purposes. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, c. 421, § 1, 36 Stat. 847.)

Historical Note

The words "the District of," which preceded "Alaska" in the original text were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387. See § 21 of Title 48, Territories and Insular Possessions.

All lands which were occupied by settlers or persons entitled to make entries, etc., under the general homestead laws included in a tract of land west of the Navajo and Moqu reservations in Arizona, and withdrawn from settlement by executive order of January 8, 1900, were exempted from the operation of such withdrawal, and such settlers were authorized, within a prescribed period, to make homestead entries of not to exceed 160 acres of such land, and submit final proof of the existence of their rights at the date of the issue of the order of withdrawal, and patents were to issue therefor upon the payment of the legal fees and purchase price, by Act Aug. 11, 1916, c. 315, 39 Stat. 504 (doubtless omitted from the Code as temporary).

Cross-References

Provisions for reservation from location, etc., of lands within Indian reservations are contained in section 148 of this title.

Provisions for withdrawal from entry of lands required for irrigation works, and lands believed to be susceptible of irrigation from such works, and provisions for entry of lands so withdrawn, are contained in section 416 of this title.

Notes of Decisions

1. Name of Act.—This Act is known as the "Pickett Act." U. S. v. Grass Creek Oil, etc., Co. (Wyo. 1916) 236 F. 481, 149 C. C. A. 533.

2. Construction.—The President's power to make temporary withdrawals of lands from entry is not negatived by this act. U. S. v. Midwest Oil Co. (Wyo. 1915) 35 S. Ct. 309, 316, 236 U. S. 459, 59 L. Ed. 641, overruling (D. C. 1913) 206 F. 141. And see Wood v. Beach (Kan. 1895) 15 S. Ct. 410, 156 U. S. 548, 39 L. Ed. 528; Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co. (C. C. Kan. 1881) 13 F. 106, reversed on other grounds (1884) 5 S. Ct. 208, 112 U. S. 414, 28 L. Ed. 794; U. S. v. Payne (D. C. Ark. 1881) 8 F. 883; (1882) 17 Op. Atty. Gen. 258; (1889) 19 Op. Atty. Gen. 370; U. S. v. Midway Northern Oil Co. (D. C. Cal. 1916) 232 F. 619.

3. Withdrawals or reservations in general.—The authority given by this act, to withdraw temporarily from entry oil lands is limited to lands which are public lands when the withdrawal was made, and does not authorize the withdrawal of lands which had been previously selected by the state in lieu of school lands before it was suspected they contained oil. State of Wyoming v. U. S. (Wyo. 1921) 41 S. Ct. 393, 255 U. S. 489, 65 L. Ed. 742, reversing U. S. v. Ridgely (C. C. A. 1920) 262 F. 675.

The executive has the right to withdraw lands from entry, settlement, or other form of appropriation without special authority from Congress. Stockley v. U. S. (C. C. A. La. 1921) 271 F. 632, reversed on other grounds (1923) 43 S. Ct. 186, 260 U. S. 532, 67 L. Ed. 390.

In a proceeding to establish a trust under a claim of homestead rights in public lands, held, that the land was a part of that included in the federal act, creating the Smiley Commission (section 3), and was in reserve under executive order of May 15, 1876, and was not restored to the public domain by said commission's order of December 29, 1891, so that plaintiff acquired no homestead rights therein. Stevens v. Southern Pac. Land Co. (1921) 195 P. 712, 50 Cal. App. 596, Id., 195 P. 714, 50 Cal. App. 805, writ of error dismissed (1922) 42 S. Ct. 588, 259 U. S. 578, 66 L. Ed. 1072. Beggs v. Southern Pac. Land Co. (1921) 195 P. 714, 50 Cal. App. 806.

The executive order of December 15, 1908, withdrawing certain public lands in Louisiana from settlement and entry or other form of appropriation to secure the public interests and in aid of such legislation as might thereafter be proposed or recommended, was within the power of the executive. Mason et al. v. U. S. (La. 1923) 20 U. S. 535, 43 S. Ct. 200, 67 L. Ed. 390.

Nowhere in the law upon which the delegation of authority was predicated do we find any authority to terminate the grazing rights of lessees and allotment holders. When the law specified that withdrawals could be made from settlement, locations, sale or entry for water power sites, irrigation, classifications of land or other public purposes to be specified in the Orders of Withdrawal without specifically naming grazing rights or specifically setting forth a general clause covering other forms of appropriation, then it was clear that grazing was not intended to be covered by the law. It is apparent in reading the items which are specified above that each of these items can be accomplished without in any way substantially affecting the grazing rights or privileges of a lessee

or allotment holder. It should be noted again that Public Land Order No. 848 specifies that the withdrawal is "subject to valid existing rights".

The Department of the Army recognized the fact that grazing allotments were not to be withdrawn or cancelled in all of the actions taken by them in dealing with the lands under Public Land Order No. 848, as described above.

The position taken by Mr. Steiner, the Hearing Examiner in his findings of fact (T.R. 70, next to the last paragraph) was that "when the withdrawal was put into effect, the lands included therein were no longer 'federal range' under the administration of the Department of the Interior subject to license and permit under the Taylor Grazing Act, supra."

This statement is patently in error, since Appellants continued to lease these

lands from the government continuously from 1952 through 1960, and renewals were accomplished and assignments made showing the lands in question were included within the allotment boundaries continuously during that time. If the statement made by Mr. Steiner, the Hearing Examiner, had been true, it would not have been necessary for the District Manager to issue a cancellation notice since the Bureau of Land Management would not have had any authority over the lands.

The attempted cancellation of Appellants' grazing leases in 1960 was in fact an attempted withdrawal of the land from public domain for use by the Yuma Test Station as a military reservation.

Under these circumstances this cancellation was not possible without first obtaining approval from Congress for this withdrawal.

Congress had long been aware of the injustices which have been perpetrated upon various lessees of the federal government by the arbitrary and capricious acts of the Department of the Army in totally disregarding the long established rights of lease and allotment holders in public lands and in February of 1958, after long and protracted hearings, Sections 155, 156, 157 and 158 were added to the Public Lands Law dealing with withdrawals, being Chapter 6, 43 U.S.C.A. Copies of these sections are set forth below for the convenience of the Court:

§ 155. Withdrawal, reservation, or restriction of public lands for defense purposes; definition; exception

Notwithstanding any other provisions of law, except in time of war or national emergency hereafter declared by the President or the Congress, on and after February 28, 1958 the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States, including public lands in the Territories of Alaska and Hawaii: *Provided*, That—

(1) for the purposes of this Act, the term "public lands" shall be deemed to include, without limiting the meaning thereof, Federal lands and waters of the Outer Continental Shelf, as defined in section 1331 of this title, and Federal lands and waters off the coast of the Territories of Alaska and Hawaii;

(2) nothing in this Act shall be deemed to be applicable to the withdrawal or reservation of public lands specifically as naval petroleum, naval oil shale, or naval coal reserves;

(3) nothing in this Act shall be deemed to be applicable to the warning areas over the Federal lands and waters of the Outer Continental Shelf and Federal lands and waters off the coast of the Territory of Alaska reserved for use of the military departments prior to the enactment of the Outer Continental Shelf Lands Act; and

(4) nothing in this section, section 156, or section 157 of this title shall be deemed to be applicable either to those reservations or withdrawals which expired due to the ending of the unlimited national emergency of May 27, 1941, and which subsequent to such expiration have been and are now used by the military departments with the concurrence of the Department of the Interior, or to the withdrawal of public domain lands of the Marine Corps Training Center, Twentynine Palms, California, and the naval gunnery ranges in the State of Nevada designated as Basic Black Rock and Basic Sahwave Mountain.

Pub.L. 85-337, § 1, Feb. 28, 1958, 72 Stat. 27.

Historical Note

References in Text. This Act, referred to in the text, means Pub.L. 85-337, which is classified to sections 155-158 of this title, section 2671 of Title 10, Armed Forces, and section 472(d) of Title 40, Public Buildings, Property and Works.

Prior to the enactment of the Outer Continental Shelf Lands Act, referred to in par. (3), means prior to August 7, 1953, which is the date of enactment of section 1331 et seq. of this title.

Admission of Alaska and Hawaii to Statehood. Alaska was admitted into the Union on Jan. 3, 1959 upon the issuance of Proc. No. 3269, Jan. 5, 1959, 24 F.R. 81, 73 Stat. c. 16, and Hawaii was admitted into the Union on Aug. 21, 1959 upon the issuance of Proc. No. 3309, Aug. 25, 1959, 24 F.R. 6868, 73 Stat. c. 74. For Alaska Statehood Law, see Pub.L. 85-508, July 7, 1958, 72 Stat. 339, set out as a note preceding section 21 of Title 48, Territories and Insular Possessions. For Hawaii Statehood Law, see Pub.L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as a note preceding section 491 of Title 48.

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 156. Same; approval by Congress of over 5,000 acres for any project or facility

No public land, water, or land and water area shall, except by Act of Congress, on and after February 28, 1958 be (1) withdrawn from settlement, location, sale, or entry for the use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, if such withdrawal, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act or since the last previous Act of Congress which withdrew, reserved, or restricted public land, water, or land and water area for that project or facility, whichever is later. Pub.L. 85-337, § 2, Feb. 28, 1958, 72 Stat. 28.

Historical Note

References in Text. The Outer Continental Shelf Lands Act, referred to in the text, is classified to section 1331 et seq. of this title.

The date of enactment of this Act, referred to in the text, means February 28, 1958, which is the date of approval of Pub.L. 85-337.

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 157. Same; applications; specifications

Any application filed on and after February 28, 1958 for a withdrawal, reservation, or restriction, the approval of which will, under section 156 of this title, require an Act of Congress, shall specify—

(1) the name of the requesting agency and intended using agency;

(2) location of the area involved, to include a detailed description of the exterior boundaries and excepted areas, if any, within such proposed withdrawal, reservation, or restriction;

(3) gross land and water acreage within the exterior boundaries of the requested withdrawal, reservation, or restriction, and net public land, water, or public land and water acreage covered by the application;

(4) the purpose or purposes for which the area is proposed to be withdrawn, reserved, or restricted, or if the purpose or purposes are classified for national security reasons, a statement to that effect;

(5) whether the proposed use will result in contamination of any or all of the requested withdrawal, reservation, or restriction area, and if so, whether such contamination will be permanent or temporary;

(6) the period during which the proposed withdrawal, reservation, or restriction will continue in effect;

(7) whether, and if so to what extent, the proposed use will affect continuing full operation of the public land laws and Federal regulations relating to conservation, utilization, and development of mineral resources, timber and other material resources, grazing resources, fish and wildlife resources, water resources, and scenic, wilderness, and recreation and other values; and

(8) if effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether, subject to existing rights under law, the intended using agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, and distribution of water.

Pub.L. 85-337, § 3, Feb. 28, 1958, 72 Stat. 28.

Historical Note

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 152. Same; mineral resources

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with

the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved. Pub.L. 85-337, § 6, Feb. 28, 1958, 72 Stat. 30.

Historical Note

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

Cross References

Mineral leasing laws, see section 1 et seq. of Title 30, Mineral Lands and Mining.

These provisions clearly set forth the requirements that notwithstanding any other provisions of the law, that except in time of war or national emergency hereafter declared by the President or the

Congress on or after February 28, 1958, the provisions of Sections 156, 157 and 158 shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States.

This Act is an express limitation on the Department of Defense and is applicable in this case and binding in this instance.

A section by section analysis of the Act is set forth in Volume 2, U.S. Code Congressional and Administrative News, 85 Congress Second Session 1958, beginning at page 2227. In the hearing the Congressional Committee stated as follows:

> "2. Section 2 contains the basic provision of the bill, which establishes a requirement that withdrawals, reservations, or restrictions of more than 5,000 acres in the aggregate for defense purposes may hereafter be made only by act of Congress.

"The section contains language which would preclude the making of a number of cumulative withdrawals, each for less than 5,000 acres, where all would be used for any one defense project or facility of the Department of Defense.

3. Section 3 would lay a more adequate base for fully determining at the local level and for congressional consideration the resource impact of proposed withdrawals."

In its committee conclusion and recommendation, the committee stated as follows:

"Its early enactment will operate to return to the legislative branch the degree of control the committee believes necessary to assure that defense use of the public lands presently held will more nearly conform to long-established maximum public multiple resource use policy, and will make certain that future public lands acquisition by the military will be so conditioned as to assure conformance with the same policy..."

Under the Constitution, Congress has been given the sole power of dealing with the property and public lands of the United

States. Article IV, Section 3, Clause 2, Constitution of the United States. This is supported specifically in the section dealing with public property in 29 Corpus Juris Secundum, page 876:

"86. Public Property

a. Federal lands
b. Property of state and municipalities

a. Federal lands

Lands under the jurisdiction of the United States and by it devoted to particular purposes cannot be condemned under the eminent domain power of a state; as to public lands, the authorities disagree.

Lands devoted to a particular use by the federal government, and over which jurisdiction has been ceded to the United States, cannot be taken under the right of eminent domain of a state, unless such use has been abandoned. Public lands of the United States within a state, subject to sale and settlement, and not reserved for any of the purposes of national government, have been held to be subject to the state's right of eminent domain, although this right seems to be denied in a later federal

> case, which holds that public lands of the United States are within the exclusive control of congress and that no state may interfere with such control."

If the government desires to use the public lands of the United States for a purpose other than for which it is being used, it is necessary that this be done under provisions other than the condemnation provisions. Congress has repeatedly recognized this in the withdrawal statutes which have allowed withdrawals of lands by presidential proclamation, by military request, etc. This withdrawal right, however, was abused by the Department of Defense in the taking of great tracts of lands for which no public purpose was apparent. In order to remedy this, Section 156 of 43 U.S.C.A. was enacted. The Senate and House Reports accompanying H. R. 5538, which became Section 158 of

43 U.S.C.A., is very revealing in giving the purpose behind the new act. These reports are contained in Volume 2, U. S. Code Congressional and Administrative News, 85th Congress, Second Session, 1958, beginning at page 2227. It is earnestly requested that the Court read the entire report which sets out fully the reasons for the enactment of this limitation on the military and provides a memorandum of the Constitutional and statutory provisions, with the Court decisions, which show that Congress intended to pre-empt the field of use of public lands by the military when this act was passed. On pages 115-122 of the Transcript of Record, Appellants have set forth in their Motion for Summary Judgment certain excerpts from the Congressional hearings which preceded the passing of Sections 155, 156, 157 and 158 of 43 U.S.C.A. It is urged that the Court

read these excerpts to establish what was in the mind of the Congress when these statutory provisions were enacted.

From the above it should be apparent that the grazing rights of Appellants were not withdrawn by Public Land Order 848 and when this was attempted to be accomplished in 1960 by the Bureau of Land Management by the purported cancellation of Appellants' lease rights this could not be done without first complying with the withdrawal limitations set forth in 43 U.S.C.A., Sections 155, 156, 157 and 158.

CONCLUSION

It is therefore respectfully submitted that Appellants were entitled to have their Motion for Summary Judgment granted and that the Court erred in not granting said Motion for Summary Judgment. It is further respectfully urged that the Court reverse

the decision of the District Court and order the Court to enter summary judgment for the Appellants herein.

Respectfully submitted this 27th day of June, 1968.

TANNER, JARVIS & OWENS

By 
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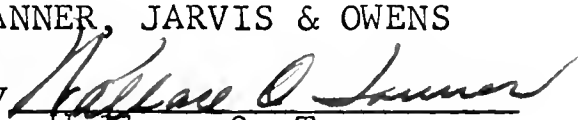
I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

TANNER, JARVIS & OWENS

By 
Wallace O. Tanner

This will certify that three copies of the Appellants' Opening Brief were served upon the United States Attorney at the Federal Building, Phoenix, Arizona, as attorney for Appellees, and three copies were mailed to the Assistant Attorney General, Land and Natural Resources Division, Attention: Jacques B. Gelin, Clyde O. Martz, and Raymond N. Zagone, Attorneys in the Department of Justice, Washington, D. C., 20530, this 28th day of June, 1968.

Wallace O. Tanner

No. 22699

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE RANCH,

Appellants

v.

WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States, and STEWART L. UDALL, Secretary of the Interior of the United States of America,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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I N D E X

CITATIONS

Cases:

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Constitution and Statutes:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

OPINION BELOW

District Judge Walter E. Craig did not write an opinion but his findings of fact and conclusions of law appear at pages 141-143 of the record.

JURISDICTION

Summary judgment was entered on November 13, 1967 (R. 144). Notice of appeal was filed on December 27, 1967

(R. 146). This Court has jurisdiction over this appeal under 28 U.S.C. sec. 1291.

ISSUES PRESENTED

Whether the complaint seeking reversal under the Administrative Procedure Act of the refusal to renew grazing permits under the Taylor Grazing Act was properly dismissed on the grounds that the district court lacked jurisdiction because:

1. The Secretary's action was agency action by law committed to agency discretion; and

2. The permits had, by their own terms, expired on June 30, 1961, making this action moot.

STATUTES AND PUBLIC LAND ORDER INVOLVED

The Administrative Procedure Act, 5 U.S.C. sec. 701, provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law. * * *

Sections 2 and 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. secs. 315a and 315b, provide in relevant part:

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, * * * and do any and all things necessary to accomplish the purposes of this chapter * * *.
>
> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts * * * as under his rules and regulations are entitled to participate in the use of the range * * * the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands.

Section 2 of Public Law 85-337, 72 Stat. 28, 43 U.S.C. sec. 156, provides in relevant part:

> No public land, water, or land and water area shall, except by Act of Congress, on and after February 28, 1958 be (1) withdrawn from settlement, location, sale, or entry for the use of the Department of Defense for defense purposes; * * * if such withdrawal, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act * * *.

Public Land Order 848, 17 Fed. Reg. 6099 (1952), provides in part:

ARIZONA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE ARMY IN CONNECTION WITH YUMA TEST STATION

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the public lands in the following-described areas in Arizona are hereby withdrawn from all forms of appropriation under the public-land laws, and reserved for the use of the Department of the Army in connection with the Yuma Test Station:

[Description of land omitted.]

The area described including both public and non-public lands aggregate approximately 892,570 acres.

This order shall take precedence over, but not otherwise affect, (1) the order of July 30, 1941, of the Secretary of the Interior establishing Arizona Grazing District No. 3, and (2) the orders of January 31, 1903, October 6, 1921, and March 14, 1929, of the Secretary of the Interior and the order of May 5, 1950 of the Bureau of Reclamation withdrawing lands for Reclamation purposes so far as such orders affect any of the above-described lands: * * *.

It is intended the lands described herein shall be returned to the administration of the Department of the Interior when they are no longer needed for the purpose for which they are reserved.

R. D. SEARLES,
Acting Secretary of the Interior.

July 1, 1952.

STATEMENT

The Mollohans 1/ brought this action pursuant to Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. sec. 702 (formerly 5 U.S.C. sec. 1009), to reverse a decision of the Secretary of the Interior, affirming intermediate departmental appeals which sustained the refusal to renew the Mollohans' grazing permits as to certain lands located within the boundaries of the Yuma Test Station in Arizona (R. 1). On cross-motions, the district court granted summary judgment for the federal officials and dismissed the Mollohans' action (R. 144-145).

The material facts are as follows: Some time prior to 1952 the Department of the Interior granted the Mollohans and their predecessors in interest grazing permits authorizing them to use portions of the federal range. Since the general area is exceptionally dry and the range lacks available feed, for most years prior to the withdrawal date in 1952, in order to preserve their rights, the Mollohans had applied for and received nonuse licenses.

After the date of the withdrawal, July 1, 1952, the Army did not (as it was entitled to) request the Department of the Interior to forthwith cancel existing 10-year permits and

---

1/ We shall, for convenience, refer to all of the appellants herein as "the Mollohans."

annual licenses within the withdrawn area. Pending the need for actual use, the Army instructed Interior to continue issuing formal annual permits so that upon their cancellation the Army might make payments to their holders, pursuant to the Act of July 9, 1942, 43 U.S.C. sec. 315q. 2/ Consequently, not only were existing licenses within the withdrawal area permitted to continue for the remainder of their terms, but they were in fact renewed for successive yearly terms.

In 1958, the United States instituted a condemnation action to acquire a leasehold estate in the area withdrawn for use of the Yuma Test Station. On July 14, 1960, the District Manager formally notified the Mollohans that so much of their permits that were located within the withdrawn area would be terminated at the expiration date of their existing permits. At that time, the Mollohans were holders of annual nonuse permits running from July 1, 1960, to June 30, 1961. 3/

2/ Withdrawal of Taylor Act grazing permits are noncompensable. United States v. Cox, 190 F.2d 293 (C.A. 10, 1951), cert. den., 342 U.S. 867. Congress enacted the Act of July 9, 1942, to relieve permit holders from such noncompensable hardships by providing that when land was withdrawn for war or national defense purposes, permit holders would be paid such amounts as the head of the Department or agency should determine to be fair and reasonable.

3/ The Mollohans challenge the right of the Secretary to "cancel" their permits. Technically, this does not accord with the actual facts. No permit here was ever cancelled during its term. The permit holders were simply informed that on their expiration date the permits would not be renewed, and they were not.

Hearings commenced by the Mollohans in 1960 in the Department of the Interior resulted in a decision declining to renew the grazing permits. This decision was affirmed on administrative appeals to the Bureau of Land Management and the Secretary. This action was then filed challenging the Secretary's final decision.

The Mollohans argued that the Secretary did not have authority to terminate their grazing privileges under Public Land Order 848, because of the enactment of Section 2 of Public Law 85-337, supra, 43 U.S.C. sec. 156, effective February 28, 1958, which limits the right of withdrawal and also, apparently, because the Government had waited for eight years after the date of Public Land Order 848 before terminating the Mollohans' rights.

The case was submitted to the district court on cross-motions for summary judment (R. 10,111). The court granted summary judgment for the federal officials (R. 144). In the findings and conclusions, the district court held first, that Public Land Order 848 was still in effect and had not been superseded, modified or altered; and second, that the Mollohans' permits were mere licenses, revocable at will by the United States without payment of compensation (R. 141-143). This appeal followed.

ARGUMENT

I

THE COMPLAINT, SEEKING TO COMPEL ISSUANCE OF PERMITS UNDER THE TAYLOR GRAZING ACT, WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION

The Mollohans assert that the district court's jurisdiction rested solely on the Administrative Procedure Act. We have steadfastly maintained that the A.P.A. is not a waiver of sovereign immunity or a jurisdictional consent to sue the Secretary. See Chournos v. United States, 335 F.2d 918, 919 (C.A. 10, 1964); Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (C.A. 8, 1967). However, we show in the Argument to follow that this case falls within the language of the cases expressly excepted from the review standards of the A.P.A., in that the agency action involved is committed to the discretion of the Secretary. Hence, while the question of the A.P.A. as a jurisdictional grant is generally important, and our views are expressed in the briefs in two cases now pending before this Court (United States, et al. v. Walker, No. 22379, and State of Washington v. Udall, No. 22413), it may not be essential to disposition of the present case.

The most recent decision of this Court on the subject, Converse v. Udall (No. 21697, Aug. 19, 1968) not yet reported, states that the A.P.A. "does apply," citing Adams v. Witmer,

271 F.2d 29, 32-33 (C.A. 9, 1958); Coleman v. United States, 363 F.2d 190, 379 F.2d 555 (C.A. 9, 1967), rev'd 390 U.S. 599 (1968); and Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959), and that "The portion of our decision in Coleman dealing with the Administrative Procedure Act was not questioned by the Supreme Court." The answer is that the point, although briefed by respondents, was never reached by the Supreme Court in Coleman. The fact is that there is no reasoned explanation in any opinion of this Circuit, including Adams, Converse and Coleman, of how the A.P.A. constitutes a grant of jurisdiction to sue the Secretary and, more important, of why the mandamus statute, 28 U.S.C. sec. 1361, should be rejected as the jurisdictional predicate for a suit against the Secretary. (We show later why the mandamus statute cannot support jurisdiction over the Secretary in this case.) Foster, it must be observed, was a suit filed in the district court for the District of Columbia. That court had inherent mandamus jurisdiction over the Secretary, since his official place of business is, by statute, the District of Columbia. No other federal court had such jurisdiction until the enactment of the mandamus statute in 1962.

Concerning Coleman, we note in elaboration that the A.P.A. was invoked as a purported basis for judicial review only by the defendant. The jurisdiction of the district court in that case was clear. It rested on the fact that the United

States instituted the suit seeking ejectment and the district court granted the relief sought. Reversing the court of appeals, the Supreme Court agreed that such judgment was correct. Hence, no problem of any kind concerning the A.P.A. was actually involved in the case. The A.P.A. was involved only by defendants' counterclaim, and this Court's discussion was addressed to scope of review, not jurisdiction of the court. Indeed, the lack of jurisdiction of the Southern District of California over the Secretary of the Interior was recognized when, after having its attention called to the fact that it could not, as it purported to (363 F.2d at p. 204), order remand to the Secretary in a case to which he was not a party, the court "invited" the Secretary to join as a counterclaim defendant. 379 F.2d at 556. He did so under 28 U.S.C. sec. 1361. Adams v. Witmer, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37 (1959), did not involve either the United States or the Secretary of the Interior as a defendant. In short, neither Coleman, Adams nor Foster presents the problem of power of the federal district court to issue orders under the Administrative Procedure Act addressed to defendants not within the court's geographic jurisdiction. That problem is presented in the other cases cited above, presently pending before this Court.

A. Jurisdiction to review the Secretary's refusal to renew the permits under the Administrative Procedure Act is precluded. - There is no jurisdiction to review the cancellation or, more accurately, the nonrenewal of the Mollohans' grazing privileges. Basically, the Mollohans' complaint is that their grazing privileges located within the Yuma Test Area (the withdrawn area) were improperly cancelled or not renewed by the Secretary of the Interior upon their expiration.

By enacting the Taylor Grazing Act, Congress gave the Secretary of the Interior broad power to "make such rules and regulations * * * and do any and all things necessary" to regulate the use and occupancy of grazing districts. Section 2, 43 U.S.C. sec. 315(a). He is authorized "to issue or cause to be issued" grazing permits to such persons "as under his rules and regulations are entitled to participate in the use of the range." Section 3, supra, 43 U.S.C. sec. 315(b). Consequently, even if upon the expiration of their licenses the Mollohans had re-applied for such licenses, they could not have obtained a court order directing their issuance, because such action is "agency action * * * committed to agency discretion by law" made exempt from judicial review by Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 701 (formerly 5 U.S.C. sec. 1009). So in Ferry v. Udall, 336 F.2d 706 (1964), this Court held that courts may not review decisions committed to administrative discretion pursuant to

a "permissive type" statute. Thus, in Sellas v. Kirk, 200 F.2d 217 (1952), cert. den., 345 U.S. 940, this Circuit sustained the dismissal of a suit to enjoin a range manager of the Department of the Interior from reducing plaintiff's permitted grazing on public lands, on the ground that granting of such grazing privileges was "agency action by law committed to agency discretion" within the meaning of Section 10, and hence was not subject to judicial review. This characterization of nonreviewable administrative action under the Taylor Grazing Act is no longer debatable. United States v. Morrell, 331 F.2d 498, 500, 502 (C.A. 10, 1964); Oman v. United States, 195 F.2d 710 (C.A. 10, 1952), cert den., 343 U.S. 977; Chournos v. United States, 193 F.2d 321, 323-324 (C.A. 10, 1951); Oman v. United States, 179 F.2d 738, 740-741 (C.A. 10, 1949); Bedke v. Quinn, 154 F.Supp. 370 (D. Idaho, 1957); Hamel v. Nelson, 226 F.Supp. 96 (N.D. Cal. 1963).

B. Mandamus jurisdiction (28 U.S.C. sec. 1361) is not applicable. - The mandamus statute explicity grants district courts jurisdiction of any action "in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." It is not applicable here.

Mandamus jurisdiction empowers a court only to enforce ministerial duties, not to review the merits of substantive decisions. E.g., United States v. Wilbur, 283 U.S. 414,

420 (1931); Wilbur v. United States, 281 U.S. 206, 218-219 (1930); Decatur v. Paulding, 14 Pet. 497 (1840). This meaning of "mandamus" was intended by Congress in enacting 28 U.S.C. sec. 1361. See 2 U.S.Cong. News, 87th Cong., 2d sess. (1962) pp. 2785, 2788-2789. In Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (C.A. 10, 1966), the court stated:

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory * * * The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt.

As we have just shown, there is no mandatory duty imposed by Congress on the Secretary to issue or renew Taylor Grazing Act permits.

C. Since the grazing permits expired by their own terms, the case was moot. - Article III, Section 2, of the Constitution limits the jurisdiction of federal constitutional courts to "cases" and "controversies." A lawsuit which has become moot is neither a case nor a controversy in the constitutional sense and no such federal court has the power to decide it. One useful definition of mootness was given in Burrell v. Martin, 232 F.2d 33, 37-38, note 10 (C.A. D.C. 1955):

> "* * * one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." (Emphasis in original.)

This defect in jurisdiction is so fundamental that a court will dismiss a case at any stage of the proceedings upon determining or being advised that it was moot when commenced or became moot because of subsequent events. Such disclosure has been made by admissions in open court, California v. San Pablo, &c. Railroad, 149 U.S. 308, 313 (1893); South Spring Gold Co. v. Amador Gold Co., 145 U.S. 300 (1892); or even by a letter from counsel, Tennessee, etc. R'd Co. v. Southern Tel. Co., 125 U.S. 695, 696 (1888). If the parties fail to call to the court's attention facts making a case moot, judicial notice may be taken of them: United States v. Chambers, 291 U.S. 217, 222-223 (1934) (ratification of the 21st Amendment); Gibbes v. Zimmerman, 290 U.S. 326, 331 (1933) (enactment of statute and issuance of orders pursuant thereto); Abie State Bank v. Bryan, 282 U.S. 765, 777-778 (enactment of statute pending appeal); United States v. Hamburg-Amerikanische Co., 239 U.S. 466, 475 (1916) (war among the European powers); Richardson v. McChesney, 218 U.S. 487, 492 (1910) (service of their terms by specific members of Congress

and election of their successors; expiration of terms of office of state official); Wilson v. Shaw, 204 U.S. 24, 30 (1907) (specific disbursements from United States Treasury); Tennessee v. Condon, 189 U.S. 64, 69-70 (1903) (provisions of state constitution); Mills v. Green, 159 U.S. 651, 657-658 (1895) (dates of state elections and opening sessions of state legislature and constitutional convention).

As noted by Sidney A. Diamond in "Federal Jurisdiction to Decide Moot Cases," 94 Univ. of Pa. L. Rev. 125, 126-127 (1946):

> Intent plays no part in determining whether or not a case is moot. No matter how anxious the parties may be to avoid the effect of mootness, the jurisdiction of the court cannot be enlarged. A stipulation which attempts to keep the controversy alive will be disregarded if the justiciable issue has disappeared, despite a continuing disagreement between the parties on the law. [California v. San Pablo & T. R.R., 149 U.S. 308 (1893) (tax paid under stipulation); San Mateo County v. Southern Pacific R.R., 116 U.S. 138 (1885) (similar facts)]. A statute which purports to confer jurisdiction to decide a moot case is unconstitutional. [Muskrat v. United States, 219 U.S. 346 (1911)].

The passage of time alone may moot a case. An action contesting the validity of a state child labor statute must be dismissed if, pending appeal, the child on whose behalf the suit was brought passes the maximum age affected by the statute, because the statute, even if valid, can no longer be enforced against him. Atherton Mills v. Johnston, 259 U.S. 13 (1922).

If, pending a criminal appeal, the sentence has been fully served, the appeal must be dismissed. St. Pierre v. United States, 319 U.S. 41 (1943). Similarly, this Circuit dismissed as moot an action against an employee by an international union seeking declaratory and injunctive relief where, the dispute having been settled and the union's sole chapter no longer being in existence, the chapter no longer represented any employees of the employer. Flight Engineers Inter. Ass'n v. Continental Air Lines, Inc., 297 F.2d 397, 401-402 (1961), cert. den., 369 U.S. 871. In Jones v. Montague, 194 U.S. 147 (1904), the plaintiff sued to enjoin an alleged violation of the right of suffrage. Prior to final appeal, the election was held so that it was no longer possible to grant any relief. The court dismissed, because "the thing sought to be prohibited has been done and cannot be undone by any order of court." 194 U.S. at 153.

In Security Life Ins. Co. v. Prewitt, 200 U.S. 446 (1906), plaintiff, a New York corporation, filed suit on January 27, 1905, to cancel and set aside the revocation by the Insurance Commissioner of Kentucky of plaintiff's permit to do business in that state. Plaintiff's permit expired of its own terms on July 1, 1905. The Supreme Court sustained the dismissal of the action by the Kentucky Court of Appeals on the grounds of mootness, Judge Peckham writing (200 U.S. at 449-450):

> If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired * * *. The refusal on the part of the Insurance Commissioner to grant authority to plaintiff to transact business after the old permit had expired does not raise a Federal question. Since the writ of error was filed the permit has ceased to have any effect, and, therefore, an event has occurred which renders it impossible for this court to grant any effectual relief in favor of plaintiff in error. In such case the court will dismiss the writ of error. Mills v. Green, 159 U.S. 651; Tennessee v. Condon, 189 U.S. 64; Jones v. Montague, 194 U.S. 147.
>
> It would seem to be plain that the cancelation of a revocation of a permit, when the permit itself has become of no effect by virtue of the lapse of time, would be useless business, and would give no practical relief to the company.

When on June 30, 1961, the Mollohans' licenses of their own terms expired, this action, too, became moot. As the district court found here, "There is no evidence that the plaintiffs applied for a license for any subsequent years, i.e., beginning with July 1, 1961" (R. 142). However useful it might be to test the validity of Public Land Order 848 and actions of the Bureau of Land Management thereunder, since the action became moot the federal courts were ousted of jurisdiction.

II

THE MOLLOHANS' OTHER ARGUMENTS HAVE NO MERIT

Since we feel the argument above is dispositive of this appeal and since the Mollohans' other contentions are without merit, we treat them summarily.

A. Public Law 85-337, which permits withdrawals in excess of 5,000 acres only upon Congressional approval, took effect on February 28, 1958, and therefore has no effect on Public Land Order 848, effective July 1, 1952. - The Mollohans argue that Public Land Order 848, supra, dated July 1, 1952, cannot provide a legal basis for cancellation of their grazing allotments, because it was superseded by Public Law 85-337, supra, 43 U.S.C. secs. 155-158, which provides that no withdrawals in excess of 5,000 acres can be made by the military without first obtaining Congressional approval (Br. 2, 21-36).

The short answer to this argument is that no grazing allotment of theirs was ever cancelled. The Mollohans held annual nonuse licenses which ran from July 1, 1960, to June 30, 1961. These simply expired of their own force and were not renewed.

Public Land Order 848 does not serve as the necessary basis of the Government's action here so the Mollohans' arguments challenging the validity of withdrawals under Public Land Order 848 are irrelevant.

The background and efficacy of Public Land Order 848 can, however, be stated quite simply. On July 1, 1952, the Secretary of the Interior, acting under the authority delegated to him by Executive Order 10355 of May 26, 1952, 17 Fed. Reg. 4831, withdrew for the use of the Department of the Army certain public land in Arizona from all forms of appropriation under the Public Land Laws.

Executive Order 10355 notwithstanding, the President has general or inherent authority by virtue of his office to withdraw public land. United States v. Midwest Oil Co., 236 U.S. 459, 471-472 (1915); Wilbur v. United States, 46 F.2d 217, 220 (C.A. D.C. 1930). In addition, he has specific authority conferred upon him by the Pickett Act, 36 Stat. 847, 43 U.S.C. sec. 141. The President's delegation of authority to the Secretary in Section 1 of Executive Order 10355, 17 Fed. Reg. 4831, recited both the President's inherent and specific statutory authority to make such delegation. See Udall v. Tallman, 380 U.S. 1, 21-22 (1965).

Public Law 85-337, supra, 43 U.S.C. secs. 155-158, does modify the power of the military to make public land withdrawals in excess of 5,000 acres by requiring that such withdrawals have Congressional approval. Public Law 85-337 has, however, absolutely no effect upon Public Land Order 848 of July 1, 1952. Section 1 of Public Law 85-337 states that

"* * * on or after February 28, 1958, the provisions hereof shall apply to the withdrawal * * * by the Department of Defense for defense purposes of the public lands of the United States * * *." Public Law 85-337 operates only prospectively and does not affect in the slightest the 1952 land withdrawal order. That is why the Findings of Fact and Conclusions of Law dated August 11, 1967, correctly state (R. 142):

> Public Land Order No. 848 dated July 1, 1952, volume 17, Federal Register, page 8099, 4/ is still in effect, and has not been superseded, modified, or altered.

B. The Government's filing of a condemnation action constituted no recognition of any rights of the Mollohans. - The Mollohans assert (Br. 19-20) that the filing of a condemnation action "constituted an express recognition by the Department of the Army that the Public Land Order did not provide it with the necessary withdrawal of the grazing rights of appellant

The initiation of a condemnation action constitutes neither the admission of any rights in others, nor the waiver of any rights of the Government. One of the most frequent uses of condemnation proceedings is simply to perfect title against unknown interests. United States v. Certain Land, 345 U.S.

4/ Sic. The correct page is 6099.

344, 348 (1953); United States v. Carmack, 329 U.S. 230, 239 (1946); Danforth v. United States, 308 U.S. 271, 282-283 (1939); cf. Best v. Humboldt Mining Co., 371 U.S. 334, 340 (1963).

So, in United States v. 93.970 Acres, 360 U.S. 328 (1959), the Government revoked a lease which provided that it could be revoked upon a determination that such revocation is essential, and which was entered into under a statute requiring that such leases be revocable "at any time." The Supreme Court held that by bringing a condemnation action, after serving notice of revocation, the Government was not estopped to assert that the lessee had no compensable interest in the property or that title was not in the United States.

C. Irrespective of Public Land Order 848, however, the District Manager could have cancelled the Mollohans' Taylor Act licenses because these licenses are privileges only which the United States can cancel or withdraw at any time without payment of compensation. - Section 3 of the Taylor Grazing Act, supra, 43 U.S.C. sec. 315(b), states that the issuance of any such license "shall not create any right, title, interest, or estate in or to the lands." Consequently, it has been definitively established in this and other circuits that permits issued under the Taylor Grazing Act confer upon the recipients a mere privilege to graze livestock--a privilege which can be withdrawn by the United States without payment

or compensation. Osborne v. United States, 145 F.2d 892, 896 (C.A. 9, 1944); United States v. Cox, 190 F.2d 293, 294-297 (C.A. 10, 1951), cert. den., 342 U.S. 867; United States v. Jaramillo, 190 F.2d 300 (C.A. 10, 1951); Oman v. United States, 179 F.2d 738, 742 (C.A. 10, 1951); Bowman v. Udall, 243 F.Supp. 672, 678 (D. D.C. 1965), aff'd sub nom. Hinton v. Udall, 364 F.2d 676 (C.A. D.C. 1966).

As stated above, the District Manager did not "cancel" the Mollohans' grazing licenses on the basis of Public Land Order 848, although he could have. All he did was to decline to renew the annual licenses after they had expired. Since the Mollohans' licenses were revocable at any time without payment of compensation, they can hardly point to any injury based on the District Manager's decision to let these licenses run their course and expire upon their own terms. The Mollohans have received every consideration to which they were entitled.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE TAIL RANCH, Appellants, vs. WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States of America, and STEWART L. UDALL, Secretary of Interior of the United States of America, Appellees.	)	NO. 22699

APPELLANTS' REPLY BRIEF

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In reply to the Appellees' Brief filed herein, the Appellants submit the following:

I

Appellees have in their Statement of Issues and throughout the Arguments presented relied on the wholly fallacious

premise that Appellants' allotments expired on June 30, 1961, by their own terms.

The documents to which Appellees are apparently referring are the "Grazing License or Permit Short Fort Applications" for non-use set forth at pages 22-22A and 24-24A in the Transcript of Record. These documents are administrative documents submitted annually to the Bureau of Land Management, to let the Bureau know the number of cattle to be grazed upon an allotment or, in the event that there is not sufficient feed to provide grazing for that year, then the application is for non-use of the allotment for that period of time. These documents do not in any way constitute the leases or allotments under which Federal lands are used for grazing purposes.

The Bureau of Land Management utilizes two different types of documents to

effectuate leases to the public. One type of lease is used wherein specific areas are to be leased under the Taylor Grazing Act. These leases, usually 10 years in length, are specific leases of a specific area described by Section number or part thereof, Township and Range.

A second type of lease is used when the government has large grazing areas which may include deeded lands, State lands, mining claims, etc., such as is the H. D. Mollohan allotment and the Eagle Tail Ranch allotment. This type of lease, called an allotment, is effected by an application being made and an allotment being granted to the lessee, leasing all of the area which the government is entitled to lease within a circumscribed area set forth upon an allotment map. This allotment does not in any way expire by its

own terms or otherwise, but is retained by the allotment holder until cancelled by the Bureau of Land Management.

The Appellants Eagle Tail Ranch and H. D. Mollohan, et al, hold allotments from the Bureau of Land Management and the annual permits to which the Appellees refer are merely the annual reports submitted to describe the use to be made of the allotment during the ensuing year.

Appellees have, therefore, premised their entire argument on the false premise that Appellants' leases had by their own terms expired on June 30, 1961.

An examination of the letters attempting to cancel the lands in question from Appellants' grazing allotments confirm the above matters, as do the subsequent letters of July 14, 1960. (See T.R., pp. 30, 31, 33, 35, 36, 38 and 39.) The first paragraph of the Bureau of Land Management's

letters of September 15, 1959, state as follows:

> "Reference is made to your grazing allotment in Arizona District 3 as indicated on your official allotment map dated August 31, 1959, on file in this office. * * * In view of the public withdrawal order provisions, you are hereby notified that public lands within your grazing allotment which were included within the boundaries of the Yuma Test Station are cancelled from your grazing allotment." (Emphasis added)

In the subsequent letters on July 14, the following statements appear:

> "You are hereby notified that the public lands included within the boundaries of the Yuma Test Station * * * is cancelled from your allotment and your allotment boundary revised to exclude said area." (Emphasis added)

> "As previously advised, this action is necessary as said lands are no longer under the grazing administration of the Bureau of Land Management. If and when these lands are returned to the Bureau of Land Management for grazing administration, preference for their grazing use will be granted to present allottees in accordance with existing rules and regulations."

This appeal is not, as stated by Appellees, an appeal of the refusal of the Bureau of Land Management to renew the grazing permits. This is an appeal of the cancellation of non-expiring allotments.

II

In the first paragraph of its arguments, the Appellees have stated that the Complaint seeks to compel the issuance of permits under the Taylor Grazing Act, and was properly dismissed for lack of jurisdiction. Here again, the basic premise of the Appellees' case is that the Appellants are desiring to compel the issuance of permits. This is not the case. The Appellants have properly attacked the cancellation of a portion of their allotments by the District Manager of the Bureau of Land Management. The Secretary of Interior was brought in as a necessary party defendant under an

order of the District Court. The Appellees have, in their challenge of jurisdiction, therefore proceeded on a completely fallacious set of premises which are not in any way applicable to the case at hand. None of the cases cited by the Appellees are pertinent to the question presented herein.

It should be noted that Appellees did not at any time raise the question of lack of jurisdiction under the Administrative Procedure Act in the District Court proceeding.

A. Subparagraph A of Appellees' Brief states that the basic problem involved in this appeal is the failure to renew a grazing lease upon its expiration. As stated before, Appellants' allotments had not expired and were attempted to be cancelled solely on the basis that the Bureau of Land Management no longer had any authority to administer the lands.

(See T.R., pp. 30, 31, 33, 35, 36, 38, and 39.)

B. The same set of circumstances is applicable to the argument set forth in Appellees' argument on "Mandamus Jurisdiction". In the concluding paragraph it is stated:

> "As we have just shown, there is no mandatory duty imposed by Congress on the Secretary to issue or renew Taylor Grazing permits."

Here again it is obvious that the Appellees are arguing something that it is not within the purview of this case.

C. The Appellees then proceed to argue that since the permits had expired by their own terms, the present appeal is moot. This also is a false premise, inasmuch as the allotments had not expired by their own terms and, in fact, as shown by the purported letters of cancellation (T.R., pp. 30, 31, 33, 35, 36, 38 and 39) the allotments remained in full

force and effect and, in fact, so remain to this date.

III

The Appellees in paragraph II argue as follows:

> "The short answer to this argument (Appellants' argument that no withdrawal under the statute was made) is that no grazing allotment of theirs was ever cancelled. The Mollohans held annual non-use licenses which ran from July 1, 1960, to June 30, 1961. These simply expired of their own force and were not renewed."

Here again we have the same fallacious premise relied on by Appellees.

Appellees in fact do not even attempt to refute Appellants' contention that cancellation was for the express purpose of avoiding the requirement set forth in Sections 155 through 158 of 43 U.S.C.A., which provides that any such withdrawals must be approved by Congress. While it is true that the Bureau of Land Management

might have authority to cancel a lease agreement, it was never intended that the government would act arbitrarily or capriciously in so doing. Section 315(b) of 43 U.S.C.A., which sets up the basic ground rules of grazing permits, expressly provides that upon termination, the permit holders will have a preferential right for renewal, so that the Bureau of Land Management could not arbitrarily cancel a permit lease or allotment and then arbitrarily award it to some other person. A copy of Section 315(b) is included herein for the convenience of the Court.

§ 315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock pur-

poses. Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior

is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession

and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands. June 28, 1934, c. 865, § 3, 48 Stat. 1270; Aug. 6, 1947, c. 507, § 1, 61 Stat. 790.

Historical Note

1947 Amendment. Act Aug. 6, 1947, provided for method to be used by the Secretary of the Interior in fixing the amount of grazing fees and by assessing a separate grazing fee and a range-improvement fee.

Congressional Comment: For legislative history and purpose of Act Aug. 6, 1947, see 1947 U.S.Code Cong.Service, p. 1038.

Cross References

Disposition of moneys received, see section 315i of this title.

While it is true, as stated in the Ohman v. U. S. case, 179 F.2d 738, quoted in the Appellees' Brief, that grazing permits are privileges withdrawable at any time for any use by the sovereign, without compensation, any such withdrawing of public lands must also meet the requirements of all other statutory provisions. Section 43-315(q) U.S.C.A. expressly provides for the payment of fair and reasonable damages for losses suffered by persons whose grazing permits or

licenses have been cancelled because of withdrawal of these lands for military purposes. For the convenience of the Court, this statutory section is set forth herein.

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§ 315q. Withdrawal of lands for war or national defense purposes; payment for cancellation of permits or licenses

Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing contained in this section shall be construed to create any liability not now existing against the United States. July 9, 1942, c. 500, 56 Stat. 654; May 28, 1948, c. 353, § 1, 62 Stat. 277.

Historical Note

Codification. Section was not enacted as a part of the Taylor Grazing Act which comprises this chapter.

1948 Amendment. Act May 28, 1948, inserted "or national defense" between "war" and "purposes" wherever appearing.

Effective Date of 1948 Amendment. Section 2 of Act May 28, 1948, provided that the amendment of this section by section 1 of Act May 28, 1948, shall be effective as of July 25, 1947.

Termination of War and Emergencies. Joint Res. July 25, 1947, c. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

Legislative History: For legislative history and purpose of Act May 28, 1948, see 1948 U.S.Code Cong.Service, p. 1614.

Cross References

Rental payments in advance, see section 315r of this title.

Notes of Decisions

Compensation, right to 2
Permits or licenses 4
Purpose 1
Rentals 5
Valuation of property 3

Library references

Public Lands ⇐50.
C.J.S. Public Lands § 73 et seq.

1. Purpose

Noncompensable hardships of the kind involved where the United States condemns land covered by grazing permits prompted Congress to amend this chapter to provide for administrative determination and payment for losses suffered from cancellation of grazing permits for war purposes. U. S. v. Cox, C.A.N.M.1951, 190 F.2d 203, certiorari denied 72 S.Ct. 107, 342 U.S. 867, 96 L.Ed. 652.

2. Compensation, right to

Holders of grazing permits in National Forest were not entitled to compensation for revocation of permits incident to taking over of National Forest by Secretary of War for military purposes, but only recourse of permittees was to apply to Secretary of War for relief under this section. Osborne v. U. S., C.C.A.Ariz.1944, 145 F.2d 892.

3. Valuation of property

Where Government condemned fee land owned by rancher and lands leased from state for war purposes but did not revoke or condemn forest grazing permit affecting public lands adjoining leased land, it was improper to value separately the permit land and add value to estimated value of the fee and leased land in arriving at just compensation for that which was taken even though it was proper to take available and accessible permit lands into consideration in arriving at compensation for fee lands taken. U. S. v. Jaramillo, C.A.N.M.1951, 190 F.2d 300.

In judicial determination of fair value as just compensation for land taken, highest and most profitable use for which it is reasonably adaptable may be considered, not necessarily as measure of value, but to full extent that prospect of demand for such use affects market value while property is privately held. Id.

Where federal government condemned fee owned by rancher and land leased from state but did not condemn forest grazing land of public domain adjoining leased land, and grazing permit was not revoked by taking and forest service issued amended permit, jury could consider in determining value of fee taken the availability and accessibility of permit land as an appurtenant element of value for ranching purposes provided consideration was also given to possibility that grazing permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. Id.

All rights, easements and privileges appurtenant thereto should be considered in estimating fair value or compensation to be paid for land taken by the Government, taking into account also the possibility of their being discontinued without resulting obligation. Id.

Where federal Government condemned cattle ranches consisting of land owned in fee by ranchers, land leased from state, and public domain on which ranchers held permits granted exclusive or preferential right to graze stipulated number of cattle, but permits were withdrawn or cancelled coincidental with taking, accessibility and availability of land covered by grazing permits could not be taken into consideration as element of value in arriving at value of fee land taken. U. S. v. Cox, C.A.N.M.1951, 190 F.2d 293, certiorari denied 72 S.Ct. 107, 342 U.S. 867, 96 L.Ed. 652.

Where cattle ranches consisting of land owned in fee by ranchers, land leased from state, and public domain on which ranchers held permits granting exclusive or preferential right to graze stipulated number of cattle were condemned by the federal Government, fair value of permit land as base land for cattle ranch in connection with grazing permit land was competent evidence of just compensation only if permit lands were accessible and available for that purpose. Id.

4. Permits or licenses

Under this chapter, government, in withdrawing the federal domain, can cancel existing permits, paying for the losses suffered, or in lieu thereof can pay rentals, and in effect lease back the government's own permit. McDonald v. McDonald, 1956, 302 P.2d 726, 61 N.M. 458.

5. Rentals

In action to determine how rentals paid by government under lease and suspension agreement for use of ranch as bombing range should be divided between brother who owned two-thirds of ranch and brother who owned one-third where brothers used premises equally and conducted cattle business on fifty-fifty basis, evidence did not support inference that nothing except annual carrying capacity set by Taylor grazing permit was used in arriving at extent of usage and conclusion that brother who owned one-third interest was entitled to share equally in rentals. McDonald v. McDonald, 1956, 302 P.2d 726, 61 N.M. 458.

In action to determine how rentals paid by government under lease and suspension agreement for use of ranch as bombing range should be divided between brothers who owned ranch and had each received a part of moneys in dispute, court erred in failing to order an accounting. Id.

In addition, the Secretary of the Army has failed to comply with Section 10-2662, U.S.C.A. which requires that the Secretary of a military department must come to an agreement with the Committee on Armed Services of the Senate and House before lands may be transferred from the Bureau of Land Management to the Department of Army. A copy of this provision is also included for the convenience of the Court.

§ 2662. Real property transactions: agreement with Armed Services Committees; reports

(a) The Secretary of a military department, or his designee, must come to an agreement with the Committees on Armed Services of the Senate and the House of Representatives before entering into any of the following transactions by or for the use of that department:

(1) An acquisition of fee title to any real property, if the estimated price is more than $25,000.

(2) A lease of any real property to the United States, if the estimated annual rental is more than $25,000.

(3) A lease of real property owned by the United States, if the estimated annual rental is more than $25,000.

(4) A transfer of real property owned by the United States to another Federal agency or another military department or to a State, if the estimated value is more than $25,000.

(5) A report of excess real property owned by the United States to a disposal agency, if the estimated value is more than $25,000.

If a transaction covered by clause (1) or (2) is part of a project, the agreement must be based on the general plan for that project, including an estimate of the total cost of the lands to be acquired or leases to be made.

(b) The Secretary of each military department shall report quarterly to the Committees on Armed Services of the Senate and the House of Representatives on transactions described in subsection (a) that involve an estimated value of more than $5,000 but not more than $25,000.

(c) This section applies only to real property in the United States, Alaska, Hawaii, and Puerto Rico. It does not apply to real property for river and harbor projects or flood-control projects, or to leases of Government-owned real property for agricultural or grazing purposes.

(d) A statement in an instrument of conveyance, including a lease, that the requirements of this section have been met, or that the conveyance is not subject to this section, is conclusive. Aug. 10, 1956, c. 1041, 70A Stat. 147.

Historical and Revision Notes

Revised Section	Source (U. S. Code)
2662 (a)	40:551
2662 (b)	40:552
2662 (c)	40:553
2662 (d)	40:554

Source (Statutes at Large)

Sept. 28, 1951, ch. 434, §§ 601-604, 65 Stat. 365, 366.

Explanatory Notes

In subsection (a), the words "must come to an agreement . . . before entering into any of the following transactions by or for the use of that department:" are substituted for the words "shall come into agreement . . . with respect to those real-estate actions by or for the use of the military departments . . . that are described in subsection (a)-(e) of this section, and in the manner therein described". The last sentence is substituted for the last sentence of 40:551 (a) and 40:551(b).

In subsection (a) (4), the words "or another military department" are substituted for the words "including transfers between the military departments". The words "under the jurisdiction of the military departments" are omitted as surplusage.

In subsection (b), the words "more than $5,000 but not more than $25,000" are substituted for the words "between $5,000 and $25,000". The words "shall report" are substituted for the words "will, in addition, furnish . . . reports".

In subsection (c), the words "the United States, Alaska, Hawaii" are substituted for the words "the continental United States, the Territory of Alaska, the Territory of Hawaii", since, as defined in section 101(1) of this title, "United States" includes the States and the District of Columbia; and "Territories" includes Alaska and Hawaii.

In subsection (d), the words "A statement . . . that the requirements of this section have been met" are substituted for the words "A recital of compliance with this chapter . . . to the effect that the requirements of this chapter have been complied with". The words "in the alternative", "or lease", and "evidence thereof" are omitted as surplusage.

Notes of Decisions

1. Withdrawal of offer

The Secretary of War having determined that a Reservation was no longer needed for military purposes, and having thereupon had the property appraised and a notice given to the State and County of their option to purchase under the statute might have reconsidered his conclusion as to the need of the property for military purposes and could have withdrawn the offer before the offer had been accepted or any action taken by the State authorities in reliance on it. 1925, 35 Op.Atty.Gen. 481.

IV

Under all of the facts of this case it is apparent that the enactment of Section 43 U.S.C.A. 155 through 158 concerning withdrawals of public lands was for the express purpose of protecting the lessees of public lands under exactly the circumstances of this case. Appellees have in their final sentence in the Brief stated that "The Mollohans have received every consideration to which they were entitled." Quite to the contrary, the Appellants have not received any of the considerations to which they are entitled. The Appellants desire only to be treated legally and equitably in conformity with the applicable laws of the United States.

The military is entitled to withdraw public lands only in conformity with existing laws, and Appellants are entitled to due process of law which includes the statutory safeguards which Appellants have prayed for herein.

Under all of the foregoing circumstances, the decision of the District Court should be reversed and the Appellants' Motion for Summary Judgment granted.

Respectfully submitted this 25th day of September, 1968.

TANNER, JARVIS & OWENS

By Wallace O. Tanner
Wallace O. Tanner

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913 Del Webb Building
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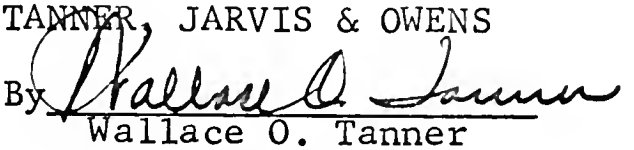
Phoenix, Arizona 85012

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

TANNER, JARVIS & OWENS

By 

Wallace O. Tanner

This will certify that three copies of the Appellants' Reply Brief were served upon the United States Attorney at the Federal Building, Phoenix, Arizona, as attorney for Appellees, and three copies were mailed to the Assistant Attorney General, Land and Natural Resources Division, Attention: Jacques B. Gelin, Clyde O. Martz, and Raymond N. Zagone,

Attorneys in the Department of Justice, Washington, D. C., 20530, this 25th day of September, 1968.

Wallace O. Tanner

NO. 22,700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED, INC. and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petitioners' Opening Brief

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Statutes

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Respondent.

Petition for Writ of Mandamus and Prohibition

PETITIONER'S OPENING BRIEF

STATEMENT OF THE ISSUES.

The following issues are pertinent to this Petition:

1. Whether the District Court abused its discretion in declining to grant Petitioners' Motion for Return of Corporate Properties pending an adjudication of the legal status of Petitioners' officers and directors.

2. Whether Respondent has required the relitigation or reconsideration of questions or issues which this Court has twice previously decided, and if so, whether it was error for Respondent to do so.

3. Whether Respondent has committed error in extending the

jurisdiction of the lower court to include consideration of questions and "issues" pertaining to the legal status of Petitioners' officers and directors when such questions or issues are not within the scope of the pleadings.

4. Whether Respondent has erred in providing relief against Petitioners and their officers and directors which is outside the scope of the pleadings and hence beyond the jurisdiction of the lower court.

5. Whether a non-moving, non-party to Petitioners' Motion For Return of Corporate Records has standing to seek affirmative relief under said motion.

6. Whether Respondent erred in his interpretation of, or disregard for, Nevada statutory law and general corporation law in refusing to recognize the authority of Petitioners' officers and directors to act on behalf of the defendant corporations (Petitioners herein).

STATEMENT OF THE CASE.

By way of preface, it should be noted that all references to transcripts and exhibits in this brief shall refer to those exhibits to the Petition on file in this proceeding No. 22,700. Citations such as "Tr. N" will refer to transcript and exhibit, and will thereafter be followed by citations as to page and lines.

In order to submit a self-contained opening brief, Petitioners shall with this Court's permission, substantially repeat the statement of the case set forth at pages 6-10 in Petitioners' Petition For Writ Of Mandamus And For Writ Of Prohibition, Either Or Both In The

Alternative, And For Other Writ Or Relief.

The statement set forth herein shall be purposely abbreviated in deference to the Court's time and its extensive previous exposure to all facets of the case--No. 311, below. Only those facts deemed pertinent to this Petition shall be noted.

NATURE OF THE CASE.

The complaint was filed February 20, 1960 by plaintiff DOLMAN. The suit was a stockholder's derivative action calculated to secure relief for purported mismanagement on the part of the late JOHN JANNEY as President of the defendant corporations, to assure payment of property taxes and the payment of wages allegedly due corporate employees. No other relief was sought by plaintiff.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

On April 4, 1960, the two corporations answered and counterclaimed, DOLMAN answered to the counterclaim on August 3, 1960, and JANNEY answered and counterclaimed on May 29, 1961.

An amended complaint was filed June 6, 1961 adding four stockholders as parties plaintiff. On July 3, 1961, DOLMAN answered JANNEY'S counterclaim.

On March 16, 1962 an Order appointing one AMERICO CAMPINI as receiver of the defendant corporations was signed and filed along with a restraining order.

On October 8, 1962 judgment was filed and entered which, inter

alia, continued the receivership, restrained JANNEY from disposing of corporate assets and records and awarded a $1,000,000.00 judgment against JANNEY.

This Court, in its 1964 judgment in No. 17,709 (Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257, Cert. denied, 380 U.S. 956, 85 S. Ct. 1081, 13 L. Ed. 2d 972), held, inter alia, that the lower court orders directing appointment of a receiver were reversed, and the receivership was to be vacated. The receiver was directed to account, settle his accounts, and return the properties and records of the defendant corporations to them prior to his discharge.

Subsequent to the Court's 1964 decision, an appeal was again taken by these Petitioners, the pertinent aspects of which concerned the District Court's legal devitalization of Petitioners' directors and officers, and the issuance of a restraining order in perpetuation of the control of the receiver. In its decision of November 8, 1967 (Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188), this Court, inter alia, held that the corporate officers and directors had not been outlawed or removed from office and that this is not an action for such relief (p. 190 of opinion). The Court also held that the continued retention of corporate records and properties by the receiver was a continuing wrong to the corporations, and that said records and properties should be returned "forthwith" and prior to the settlement of the receiver's accounts unless the trial court determined promptly, a valid reason for not doing so. (P. 193 of opinion.)

On January 5, 1968 the defendant corporations filed a Motion For

Return Of Corporate Properties which was thereafter set for hearing on February 12, 1968. On February 9, 1968, one judicial day before the scheduled hearing, plaintiff DOLMAN and receiver CAMPINI filed their Motion To Continue Hearing Date On Defendants' Motion For Return Of Corporate Properties supported by an unsworn, unacknowledged "affidavit" purportedly signed by CAMPINI. Petitioners' counsel objected to the "affidavit" and asked that it be stricken (Tr. F-8: 10-15) but JUDGE FOLEY held:

> "If it is not an affidavit it is a statement at least of the contentions made as to the validity of the election of the purported officers of this company.: (Tr. F-9: 8-10)

The trial judge also raised, sua sponte, the issue of the validity of the defendant corporations' officers (Tr. F-5: 20-25; 6: 15-21) and thereafter granted the DOLMAN and CAMPINI motion continuing the hearing on Petitioners' Motion For Return Of Corporate Properties until March 12, 1968.

In the hearing on March 12, 1968 of Petitioners' Motion For Return Of Corporate Properties, JUDGE FOLEY indicated that he was ready to order the return of the records and properties to the defendant corporations "right now" (Tr. B-26: 5-10) but held that he would not do so "until it is determined that there are proper officers." (Tr. B-40: 2-6) The trial judge also opined that "it seems to me that we haven't a valid Board of Directors" (Tr. B-26: 2-3) and thereafter ordered the parties to submit briefs on the legal status of Petitioners' officers and

directors. (Exhibit A)

In the last hearing on Petitioners' Motion For Return Of Corporate Properties held May 22, 1968, Respondent first denied said motion (Tr. N-28: 14-25; Exhibit O) and subsequently ordered the withdrawal of the denial (Tr. N-38: 9-14; Exhibit O) in order to give "full consideration...to the position stated by Mr. Sargent [a New York attorney who is not a party to the action or the motion]...." Respondent then ordered the cause continued indefinitely (Exhibit O) in order for counsel to consider the proposals submitted by strangers to the action and interlopers to the motion. (Tr. N-42: 2-19)

STATEMENT OF FACTS.

The facts pertinent to the instant proceeding are basically interspersed in the immediately preceding paragraphs. In brief, however, the following facts may be re-emphasized as the underpinnings of this Petition:

This Court, in Pioche Mines Consolidated, Inc. v. Dolman, supra, ordered the receivership vacated and Petitioners' properties and records returned. Over three years after said decision, in a subsequent appeal by the defendant corporations (Petitioners herein) this Court again ordered Respondent to return Petitioners' properties and records "forthwith, unless the court determines promptly, that there is a good reason for not doing so." (See Ely Valley Mines, Inc. v. Lee, supra at 193) In the latter opinion, this Court also reiterated its declaration in the former opinion that the instant action was not a

proper vehicle for removing or outlawing Petitioners' officers and directors and held further, that said officers and directors have not been outlawed or removed. (Id at 190)

During an initial hearing on Petitioners' Motion For Return Of Corporate Properties held February 12, 1968 Respondent again raised, sua sponte, the question of the validity of Petitioners' officers and directors. (Tr. F-5: 20-25; 6: 15-21) In a subsequent hearing held March 12, 1968 Respondent declared that he was willing to return the properties and records "right now" (Tr. B-26: 5-10) but refused to do so "until it is determined that there are proper officers." (Tr. B-40: 2-6)

At the conclusion of the last hearing on said motion, held May 22, 1968, Respondent refused to recognize Petitioners' officers and directors (Tr. N-27: 19-25; 28: 1-25) and ended up continuing the cause indefinitely (Exhibit O) in order that counsel might consider, over Petitioners' objection, proposals submitted at said hearing by non-moving strangers to the action. (Tr. N-42: 5-19)

SUMMARY OF THE ARGUMENT.

Petitioners contend that Respondent was obligated to promptly obey the mandate of this Court in Ely Valley Mines, Inc. v. Lee, supra. Respondent declared that he was ready to return the corporate records and properties to Petitioners "right now," but that he would not do so until either the entitlement of Petitioners' officers and directors to their respective offices has been proved "beyond all doubt"

or until he is so ordered by this Court. Respondent has thus divested himself of all further discretion to withhold the immediate return of Petitioners' records and properties since this Court has held that the legal status of Petitioners' officers and directors is not before the lower court, and since Respondent has indicated that the legal status of said officers and directors is the only impediment to the return of said records and properties. Petitioners specify error by Respondent in not promptly following this Court's mandate, as aforesaid, since Respondent's only ground for not doing so was expressly eliminated as a reason for withholding prompt return of Petitioners' records and properties.

This Court, first in Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257, Cert. denied, 380 U.S. 956, 85 S. Ct. 1081, 13 L. Ed. 2d 972, and later in Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188 held that the instant case is not an action upon which relief could be granted to depose or disfranchise Petitioners' officers and directors. In the latter decision, special clarification was given both to Respondent and plaintiffs emphasizing that Petitioners' officers and directors had not been outlawed or removed. Notwithstanding the aforesaid decisions of this Court, Respondent has continued to assert the viability of his earlier finding that Petitioners are without valid directors and has forced Petitioners to relitigate questions or "issues" pertaining to the validity of its officers and directors, which questions or "issues" were twice previously determined by this Court. This is specified as error.

Respondent, in requiring an adjudication of the validity of Petitioners' officers and directors seeks to extend the jurisdiction of the lower court to include issues which are outside the scope of the pleadings. This is specified as error, since a court may not properly consider issues or questions which have not been pleaded.

Although the amended complaint on file herein sought no relief against Petitioners and sought no invalidation or removal of Petitioners' officers and directors, Respondent has provided such relief by finding that Petitioners have no valid directors and refusing to recognize or acknowledge same as Petitioners' agents. The result of such finding and refusal has been a complete and indefinite frustration of this Court's mandate in Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra, requiring the wrongfully appointed receiver to return the properties and records of the Petitioners to them. Petitioners contend that it was error for Respondent to attempt to extend the jurisdiction of the lower court to provide relief not within the action.

Petitioners contend that the lower court erred in extending standing to non-moving strangers to the action to assume control of Petitioners' Motion For Return Of Corporate Properties and hold out relief to such non-moving strangers. Said strangers, who were interlopers in the aforesaid motion, had no standing to seek affirmative relief under Petitioners' motion.

Petitioners contend that even assuming, arguendo, that Respondent had jurisdiction over issues pertaining to the validity of

Petitioners' officers and directors, Respondent either misinterpreted or disregarded applicable statutes of the state of Nevada and general corporation law, both of which require judicial recognition of the entitlement of Petitioners' officers' and directors' to their respective offices. Under Nevada Revised Statutes (NRS) 78.340, hold over directors retain their offices and corporate duties. This result likewise obtains under the general rule of law. While maintaining and reasserting the de jure status of their officers and directors, Petitioners aver that under all applicable law, said officers and directors would in any event be accorded a de facto status.

ARGUMENT.

I.

THE DISTRICT COURT HAS ABUSED ITS DISCRETION IN REFUSING TO COMPLY WITH THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. V. LEE, 9 Cir., 385 F.2d 188 ON GROUNDS WHICH THIS COURT HAS HELD ARE NOT WITHIN THE SCOPE OF THIS ACTION.

On March 16, 1962 the lower court appointed a receiver who assumed control over the records and properties belonging to Petitioners. This Court, in its 1964 decision in No. 17,709 (Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257) held, inter alia, that said receiver had been wrongfully appointed and ordered the receivership vacated. It was further ordered that the action against the Petitioner Ely Valley Mines, Inc. be dismissed.

Over three years after the aforesaid decision in Pioche Mines Consolidated, Inc. v. Dolman, supra, the receiver still had possession

of and control over Petitioners' records and properties. This prompted the appeal in No. 19,761 to this Court for relief from a receiver who, in spite of the vacation of his receivership, still retained Petitioners' records and properties and enjoyed a status before the lower court which enabled him to continue obtaining restraining orders against Petitioners. During the major portion of the oral argument in the aforesaid appeal, counsel for defendants (Petitioners herein) argued concerning the problem of a lower court finding that the defendant corporations did not have valid officers and directors. This problem was of paramount importance to said corporations which were ostensibly joined in the action (No. 311, below) as nominal defendants and were nevertheless devastated by a finding which, if undisturbed, left the corporations "rudderless," without officers, directors or agents by and through which they could affirmatively assert themselves as legal entities. Counsel for defendants on appeal emphasized the extreme consequences of this finding by calling this Court's attention to the fact that Respondent had even refused to recognize legal counsel selected by the late JOHN JANNEY, as President, to represent the defendant corporations. Further, it was evident that the mandate of this Court requiring the receiver to return Petitioners' records and properties would remain indefinitely frustrated since, under the aforesaid finding, there were no authorized corporate officers or directors available to receive the properties. It was thus the chief concern of the aforesaid appeal to obtain relief from the corporate anarchy or limbo created by the aforesaid finding of the lower court.

It is respectfully submitted that the relief sought from the aforesaid finding of the lower court came with forceful clarity from this Court in Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188, 190 when this Court held:

> "the judgment does not outlaw Janney, either personally or as president of either corporation, much less does it outlaw the two corporations. It certainly does not prohibit either corporation from asserting whatever right it may have in this litigation. Each is entitled, like every other litigant, to its full day in court, whether its pleading be signed or verified on its behalf by Janney as its president or by some other officer or agent. Each is entitled to have its counsel recognized in this case, whether or not they were retained on its behalf by Janney as president. He has not been removed as president. The directors and other officers have not been removed from office. And we have held that this is not an action for such relief." (See 333 F.2d at 273)

Buttressed and revitalized by the aforesaid decision of this Court, Petitioners filed their Motion For Return Of Corporate Properties on January 5, 1968--almost three and one-half years after the receiver

had first been ordered to return the properties and records of the defendant corporations. On February 12, 1968, the first hearing on the motion, Respondent made it clear that Petitioners were still to be involved in a fight for the lives of their officers and directors, while the receiver was to maintain his grasp on Petitioners' properties and records. The following statements of record are supportive of the foregoing premise and are indicative of Respondent's attitude concerning the receivership, the legal status of Petitioners' officers and directors and the return of their records and properties:

> "COURT: Haven't you also made some gesture as to whom--if the Court should order the return of the properties to the corporations, as to who the properties should be delivered to? Have we got valid officers of the corporations?
>
> "MR. SINGLETON: That is a question raised by Mr. Campini in the affidavit."
>
> (Tr. F-5: 20-25)
>
> "MR. STEFFEN: And they have been wrongfully deprived of their properties.
>
> "COURT: And that is a question I am not in agreement with the Court of Appeals on either. I am not cured of the feeling that the thing to do in this case was to appoint a Receiver -- but that is the way I feel

about it, and I say that in due respect to the Court of Appeals.

"I have been reversed a lot of times and so have they. I know that." (Tr. F-18: 20-25; 19: 1-4)

At the next hearing on said motion held March 12, 1968, the following statements were made:

"[COURT]: Now, from the statement of the Court of Appeals, I think we can all agree that it is the duty of the Court to return these properties to the corporations. But, who represents the corporations." (Tr. B-13: 7-10)

"COURT: My thought right at this moment is this. In a case of this kind, the Court should -- in circumstances where a receiver is appointed and it is found by the Court that the receivership was improperly - the receiver was improperly appointed, which I humbly disagree with -

"MR. SHENK: So do I, Your Honor; not humbly, but I sincerely believe -

"COURT: That is the command of the Court of Appeals." (Tr. B-24: 6-13)

"[COURT]: Now, it seems to me that we

haven't a valid Board of Directors.

"MR. SHENK: No, sir.

"COURT: The Board of Directors are authorized, and the only ones authorized to elect the officers. I want to turn this property back right now to the proper custodians and representatives of these corporations, but I don't know who they are." (Tr. B-26: 2-9)

"COURT: I want to deliver this property back to the corporations and I want to know beyond any doubt that the people to whom it is ordered are rightfully entitled to it. That is all I want. Isn't that the main point?

"MR. SHENK: It certainly is.

"COURT: And it is your contention that they are not -

"MR. SHENK: It certainly is.

"COURT: And your associate's contention?

"MR. DeLANOY: Yes, your Honor."

(Tr. B-30: 16-24)

"COURT: I want to tell you something. I think it is my duty to return this property to the proper representatives of the corporations, but I don't know who they are.

"MR. STEFFEN: Well, Your Honor, in this Opinion it is stated that, No. 1, this Court has always taken the position that Janney was not a proper officer. This Court held the fact that it is alleged that Janney is not a proper officer is not a valid reason for withholding the properties.

"COURT: No, it was not. It ordered them to go back to the company.

"So, it recognizes Janney's authority as president.

"Now, I don't know if this man Gallagher is president or not. I have no idea. But I have the idea that there is no valid existing Board of Directors.

"MR. STEFFEN: Your Honor, this decision specifically states that these Directors have not been removed and this is not an action to question the election of the Directors.

"COURT: They have a term, and I don't think a corporation when elected is a king or monarchy to serve for life. I don't believe that." (Tr. B-38: 1-21)

"COURT: I don't know if that is. I am not going to turn this property back to anyone who I don't

believe is a valid officer of this corporation until I am - I am not going to turn this property back to anyone until it is determined that there are proper officers-

"MR. STEFFEN: This proceeding is to validate or otherwise the Board of Directors-

"COURT: I am going to take a recess. That is the disposition-to determine the validity of the existing Board of Directors. I have not decided any matter. I am just looking for legal information and factual information as supported by the authorities." (Tr. B-40; 2-13)

The extent of the problem may be illustrated further by the following excerpts from the last hearing on said motion, held May 22, 1968:

"COURT: I am going to add something, too. I am going to retract--I am going to retract the statement I made. I am not going to turn this property over to anyone unless I am awfully satisfied that the Court of Appeals thinks they are who they say they are. Am I going too far?

"MR. SHENK: No, you are not." (Tr. N-13: 12-17)

"COURT: I am not saying these men are such at all. I am not saying that these men are such, but

I am not going to turn these papers or any documents of value over to anyone unless I know from the minutes of a legally constituted meeting of the Directors, elected by the stockholders of the corporation as shown by the minutes of a stockholders' meeting, I am not going to turn it over and I am going to have those in Court or I am not going to act at all." (Tr. N-17: 13-20)

"MR. STEFFEN: Suppose Mr. Janney was alive and here today. Would you have returned those records to Mr. Janney?

"COURT: I don't know. Because I did hold one time he was not President of the corporation.

"MR. STEFFEN: That is right. Now, what did the Court of Appeals hold?

"COURT: Mr. Janney is dead.

"MR. STEFFEN: That is correct.

"COURT: I don't know whether I would or not return it to the man, and I don't see how in the world--

"MR. STEFFEN: Didn't the Court of Appeals order the records be returned, and the fact that Mr. Janney was President did not--

"COURT: That is right. They went so far as to

order this Court to return them to the corporations. They didn't order the individuals to receive them.

"MR. STEFFEN: But they did state--

"COURT: Well, let them; you go up there and argue with them and see if they will make an order.

"MR. STEFFEN: I am reading directly from the order, your Honor, (reading) 'As we have pointed out, the fact that John Janney is still the President of each corporation is not such reason'--that is, a reason for not returning the properties.

"Now, in this Opinion the Court of Appeals stated that Janney has not been outlawed or removed as President.

"COURT: Why bring Janney into this?

"MR. STEFFEN: Then it goes on to state that the Directors have not been outlawed.

"COURT: You are not asking me to return them to Janney, are you?

"MR. STEFFEN: No, your Honor. I wish he was here. And then it goes on to say that the Directors have not been outlawed.

"Now, how can this Court say that these same

Directors--

"COURT: Now, what report is this. I have the Advance Sheets--the one of August 24, 1964.

"MR. STEFFEN: It is the one at 385 Fed 2d 188.

"COURT: And I am looking at page 188.

"MR. STEFFEN: And if you will look at page 190, your Honor, and I might that I--

"COURT: What page?

"MR. STEFFEN: 190.

"COURT: All right.

"MR. STEFFEN: On paragraph one--

"COURT: Let me look at it a minute. This concerns John Janney.

"MR. STEFFEN: And the Directors, your Honor.

"COURT: I have no reason to doubt that John Janney was not--was elected by a duly qualified procedure.

"MR. STEFFEN: This Court held that he was not.

"COURT: What?

"MR. STEFFEN: This Court held that he was not President.

"COURT: Maybe I did. And maybe the facts would carry it out. I am just talking for the record here now.

"MR. STEFFEN: But, your Honor, the Court of

Appeals held otherwise and it went on to state, (reading) 'He has not been removed as President. The Directors and other officers have not been removed from office and we have held that such is not an action for relief.'

"COURT: If that is true you can get a certified copy of the minutes of the meeting from the Secretary of this corporation. Would you accept that, Mr. Shenk?

"MR. STEFFEN: I have them right here, your Honor.

"MR. SHENK: And I won't accept the certificate.

"COURT: No, from the Secretary. Is this the Secretary of the corporation?

"MR. SHENK: He is so listed today.

"MR. STEFFEN: And he was at the time of this Opinion." (Tr. N-17: 25; 18; 19; 20: 1-21)

"COURT: And I am not going to turn this property over to somebody unless I am satisfied that he or she is entitled to receive it. So, unless the Court of Appeals assumes the responsibility for such conduct and directs me to do it, I stand ready to obey their directive." Tr. N-27: 19-23)

It can be seen from the foregoing statements by Respondent that:

(1) Respondent still maintains that the receivership was proper; (2) Respondent insists on adjudicating the legal status of Petitioners' officers and directors; (3) Respondent will not return the records and properties to Petitioners until he has judicially legitimated--from proof admitting of no doubt--the officers and directors of these petitioning corporations; and (4) Respondent invites an order of this Court directing the lower court to return Petitioners' records and properties.

"It is the duty of the District Court promptly to obey a mandate from the Appellate Court, and its failure to do so can be corrected by mandamus." Federal Home Loan Bank of San Francisco v. Hall, 9 Cir., 225 F.2d 349, 385, footnote 12. The case and footnote just cited referred to the case of Brictson Mfg. Co. v. Woodrough, 8 Cir., 284 F. 484, where it was held that the District Court was without power to delay the return of property held by a receiver declared by the Court of Appeals to have been wrongfully appointed, pending hearing of applications for intervention by other claimants.

In the instant case, Petitioners allege "abuse" of discretion by Respondent advisedly, since this Court left the door open for a prompt determination by Respondent as to a valid reason for not immediately returning Petitioners' records and properties. In the language of this Court's mandate,

> "The properties and records should be surrendered forthwith, unless the Court determines, promptly, that there is a good reason for not

doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason." Ely Valley Mines, Inc. v. Lee, supra, at page 193.

In a hearing on Petitioners' Motion for Return of Corporate Properties held March 12, 1963 Respondent declared that he was ready to order return of the corporate records and properties "right now" (Tr. B-26: 5-10) but held that he would not do so "until it is determined that there are proper officers." (Tr. B-40:2-6) By the Respondent's own admission, therefore, the only remaining impediment to the return of the records and properties was his own requirement concerning the validation of Petitioners' officers and directors.

Petitioners respectfully assert that the aforesaid impediment interjected by Respondent as an issue to be litigated and resolved prior to acting on this Court's said mandate, was an abuse of the discretion left to Respondent. This Court had settled the waters on this "issue," and yet Respondent refused to accept the determination of this Court.

Respondent argues, however, that this Court's mandate was based upon an incorrect assumption, i.e., that the defendant corporations had validly elected directors and officers. (See Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5.) It is inconceivable to Petitioners how Respondent can genuinely assert such an argument. All of the alleged facts concerning the alleged mismanagement of the late JOHN JANNEY have been before this Court previously. It is,

in fact, a gross understatement to note that this Court has been inundated with papers, pleadings, exhibits and records descriptive of the scope of the controversies between the parties. Respondent has added nothing new to the picture. He simply says, in effect, that if this Court had his insight it would have qualified its mandate by making it inapplicable as long as JANNEY was President of the corporations, and until such time as the directors and other officers passed muster under an adversary proceeding held in conjunction with the case in chief. Respondent thus takes the unarticulated but obvious position that this Court's said mandate was also afflicted with error in holding that this action is not a proper vehicle for purposes of determining the legal status of Petitioners' officers and directors.

Respondent also seeks to justify his avoidance of the mandate in Ely Valley Mines, Inc. v. Lee, supra, by stating that he has

> "not purported to "remove" the alleged directors of either corporation. The Trial Court has simply recognized the fact that in its opinion, neither corporation has any validly elected directors or officers to whom this Trial Court could, in good conscience, deliver the assets of either corporation." (Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5: Tr. N-25: 13-25; 26: 1-10)

By use of an obvious circumlocution, Respondent thus seeks to achieve the same result negatively which he was unable to accomplish positively. Since this Court has held that Petitioners' officers and directors have not been "outlawed" or "removed" the Respondent merely refuses to acknowledge their validity, thus taking the position that there are no officers or directors to remove, and that this Honorable Court erred in assuming there were. If this type of "back door" approach could be sustained by the law, it would create chaos among corporations. It would mean that, as here, a dissident stockholder purporting to own less than one per cent of the issued stock, could file a pretended derivative action ostensibly seeking damages on behalf of the corporation, and ultimately succeed in decapitating the governing board and officers of said corporation without even formally praying for such relief in the complaint! And it remains sadly inconceivable to Petitioners that Respondent's conscience will not permit him to recognize the authority of their officers and directors who have not been "removed" or "outlawed" but that it will permit him to continue the possession and control of Petitioners' records and properties in a distant receiver who has been "outlawed" and "removed" both by this Court and the Respondent in his judgment filed November 2, 1964.

Respondent's attempt, as noted above, to justify his refusal to recognize Petitioners' officers and directors as proper agents to receive the corporate records and properties is both specious and anomolous. It is specious because it openly assumes that Petitioners entered the litigation persona non grata while silently but of necessity

concluding that this Court either erred in holding that the late JANNEY and the officers and directors had not been outlawed or that this Court's mandate was inadequate in not having restricted its proclamation concerning the removal and outlawing of Petitioners' officers and directors only to those officers and directors found by Respondent to have proper authority. It was anomolous because Respondent openly accepted this Court's mandate in Ely Valley Mines, Inc. v. Lee, supra, as recognizing the late JOHN JANNEY as President of the defendant corporations, (See Tr. N-19: 25; 20: 1-7; and Tr. E-38: 11-12) and yet Respondent took the simultaneous position that although JANNEY had authority as President, the directors who employed him had no authority to do so. Certainly if the directors were without authority to act for the corporations, JANNEY could not have received from them an authoritative call to office.

Petitioners vigorously but respectfully assert that they have been denied their right to a prompt compliance with the mandate of this Court in Ely Valley Mines, Inc. v. Lee, supra, and that Respondent has no prerogative to assume error or inadequate draftsmanship on the part of this Court in order to avoid compliance with the clear import of its mandate.

In the most recent hearing on Petitioners' Motion For Return Of Corporate Properties, held May 22, 1968, Respondent first denied the motion (Tr. N-28: 14-24), then later withdrew the denial in order to use said motion as a vehicle for considering a form of relief sought by interlopers to the proceeding (Tr. N-38: 9-14) and finally ordered that

the hearing on the motion be continued indefinitely until Respondent sees fit to resume it. (Tr. N-43: 6-11) Petitioners were thus left with the stark realization that no relief was to be given them by Respondent unless they were to accede to a scheme conceived and asserted by strangers to the litigation which would deprive Petitioners of their rights both under this Court's said mandate and the statutes of the state of Nevada.

It is respectfully urged that Respondent has abused his discretion in refusing to return Petitioners' records and properties pursuant to the said mandate of this Court, and that Petitioners are entitled to a writ of mandamus in order to salvage a reasonably seasonable benefit from the said mandate.

II.

THE DISTRICT COURT HAS ERRED IN DEPRIVING PETITIONERS OF THEIR ENTITLEMENT TO IMMEDIATE RELIEF UNDER THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. V. LEE, 9 Cir., 385 F.2d 188 BY REQUIRING PETITIONERS TO RELITIGATE AN "ISSUE" TWICE PREVIOUSLY DECIDED BY THIS COURT.

It is clear that a determination on the point of error here asserted turns on the meaning of the opinions of this Court under Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra. Petitoners contend that the unambiguous declaration of the latter opinion is that the officers and directors functioning as of the date of said opinion had not been removed from office nor had they been outlawed, and that this is not an action for such relief. (See 385 F.2d at 190.) In both of the aforesaid decisions, this Court held that

this action was not a proper vehicle for attacking the legal status of Petitioners' officers and directors.

Armed with this Court's mandate in Ely Valley Mines, Inc. v. Lee, supra, Petitioners again sought the return of their records and properties from the tenacious receiver who had been wrongfully possessing and controlling them since 1962. According to said mandate the records and properties were to be "surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so." (See 385 F.2d at 193.) At the initial hearing on Petitioners' Motion For Return Of Corporate Properties held February 12, 1968 it became immediately and painfully evident that Respondent would require a complete adjudication of the status of Petitioners' officers and directors as a condition precedent to the surrender of Petitioners' records and properties. In response to an unsworn "affidavit" by the deposed but still viable and acting receiver, AMERICO CAMPINI, the following colloquy occured:

> "COURT: Haven't you also made some gesture as to whom--if the Court should order the return of the properties to the corporations, as to who the properties should be delivered to? Have we got valid officers of the corporations?
>
> "MR. SINGLETON: That is a question raised by Mr. Campini in the affidavit." (Tr. F-5: 20-25)

Later, in the same hearing, Respondent declared:

> "COURT: There is a question to be raised here

as to who represents this corporation legally under the laws of Nevada." (Tr. F-15: 13-15)

Thereafter, in subsequent hearings on said motion, the following statements were made:

"[COURT]: Now, from the statement of the Court of Appeals, I think we can all agree that it is the duty of the Court to return these properties to the corporations. But who represents the corporations." (Tr. B-13: 7-10)

"COURT: I am interested in endeavoring to come to a correct decision.

"MR. SHENK: Well, I believe the written briefs would be of great assistance.

"COURT: As to whether or not we have a valid Board of Directors?

"MR. SHENK: That is correct.

"COURT: And whether or not we have officers and Directors legally authorized to have anything to do with this corporation?

"MR. SHENK: That is correct.

"COURT: Especially holding or taking and receiving property belonging to the corporations.

"MR. SHENK: That is true." (Tr. B-29: 12-25)

"COURT: Yes. And there hasn't been one since. I don't believe we have got a Board of Directors. Now, I want authority on that, and what I am inclined to do is to continue this matter so that this could be briefed, because I am not going to turn back any properties of this corporation to anyone except duly authorized persons to represent the company and receive this property." (Tr. B-14: 7-13)

"COURT: I don't know if that is. I am not going to turn this property back to anyone who I don't believe is a valid officer of this corporation until I am - I am not going to turn this property back to anyone until it is determined that there are proper officers -

"MR. STEFFEN: This proceeding is to validate or otherwise the Board of Directors -

"COURT: I am going to take a recess. That is this disposition - to determine the validity of the existing Board of Directors. I have not decided any matter. I am just looking for legal information and factual information as supported by the authorities." (Tr. B-40: 2-13)

"[MR. SHENK]: Now, when this Court heard this action, your Honor, in 1962, there was a

specific -- I mean, this same contention was raised. And this Court clearly found, your Honor, --and I have recited it in the--in our Memorandum, but in your Findings of Fact, you clearly found, and I am referring to Findings Number Ten--at that time this Court found that no valid stockholders' meetings have been held of Pioche Mines Consolidated, Inc. since its incorporation in 1928 with the exception of one meeting in 1942 or 1943. That is the one to which Mr. Shaw has here related.

"Without just cause, no valid meeting of the stockholders of Ely Valley Mines, Inc. has been held since 1957--without just cause.

"And sub-division four under this Finding, after that initial Finding, the Court recites, 'No valid Board of Directors have been elected by said corporations personnel--without just cause.'

"Now, that Finding was not disturbed on Appeal, your Honor. It has remained as a Finding of this Court that has had the approval and the blessing of the Ninth Circuit Court of Appeals and the United States Supreme Court." (Tr. N-11: 11-25;

12: 1-7)

"COURT: This becomes the subject, that the officers and directors were not removed from office. That is not the only thing involved here. The question is if their terms expired were they ever re-elected.

"MR. SHENK: That is my position, your Honor, and contrary to what Counsel states here. This Court never undertook to remove any alleged officers from office.

"COURT: No.

"MR. SHENK: But you did make a determination and finding that those individuals holding themselves out as a Director and an officer did not hold such an office pursuant to the elections of a meeting of stockholders as required by law."

(Tr. N-25: 13-25)

It is thus irrefutable that Respondent has persisted to use the instant action as a vehicle for determining "issues" and questions pertaining to the validity of Petitoners' officers and directors. Respondent's effort to avoid the impression of not having "removed" Petitioners' officers and directors is sheer sophism. (See also, Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5.) A finding by Respondent that Petitioners' officers and directors have not

been validly elected and have no authority to act on behalf of the corporations is tantamount to "removing" or "outlawing" said officers and directors.

The gravamen of Petitioners' position asserted here is that this Court has twice previously held that this action is not suitable for attacking or questioning the legal status of Petitioners' officers and directors and that, pursuant to the opinion in Ely Valley Mines, Inc. v. Lee, supra, Petitioners' officers and directors are to be recognized by Respondent since they have not been outlawed or removed from office. In spite of the clear and unambiguous language in the aforesaid opinions of this Court, Respondent requires the relitigation or continued litigation of the legal status of Petitioners' officers and directors. This has now become the major point of issue and dispute in the entire proceeding.

In this Court's opinion in Federal Home Loan Bank of San Francisco v. Hall, 9 Cir., 225 F.2d 349, 371 it was held:

> "there is ample precedent in the cases to sustain the principle that an opinion of an appellate court is to be consulted to ascertain what was intended by its mandate and that questions considered and decided in the opinion of the court are not to be reexamined in any subsequent stage of the same case."

The point is further emphasized in Lummas Co. v. Commonwealth Oil

Refining Co., 2 Cir., 297 F.2d 80, cert. denied, 82 S. Ct. 601, wherein it was held:

> "the right not to have to relitigate an issue so determined [by Court of Appeals] is as much entitled to extraordinary protection as the right to jury trial, the right to trial before an unbiased judge, or the right to trial directly by a judge rather than initially by a master."

It was the duty of the District Court to promptly obey the mandate of this Court in both Pioche Mines Consolidated, Inc. v. Dolman, supra, and especially Ely Valley Mines, Inc. v. Lee, supra. See Federal Home Loan Bank of San Francisco v. Hall, supra, at page 385, footnote 12. Because the lower court has persisted in requiring Petitioners to relitigate the alleged "issue" concerning the validity of their officers and directors after the question has twice previously been decided by this Court, Petitioners have been greatly prejudiced and injured by an additional and unnecessary delay, extending at least beyond one year, in the return of their corporate records and properties. Such delay has greatly pyramided the costs of this litigation.

Petitioners respectfully submit that Respondent has erred in attempting to adjudicate the legal status of the officers and directors of the defendant corporations since, as noted above, this Court has twice previously disposed of the "issue"--even to the extent of holding that this action is not a proper vehicle for such relief. Under the law,

Petitioners are entitled to the benefit of said Appellate rulings without having to relitigate their propriety in the lower court.

III.

THE DISTRICT COURT HAS EXCEEDED ITS JURISDICTION IN REQUIRING AN ADJUDICATION OF THE VALIDITY OF PETITIONERS' OFFICERS AND DIRECTORS PRELIMINARY TO THE RETURN OF THE CORPORATE RECORDS AND PROPERTIES SINCE THE LEGAL STATUS OF SAID OFFICERS AND DIRECTORS IS NOT AN ISSUE IN THE ACTION.

In both the 1964 decision of Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra, this Court held that this action was not a proper vehicle for providing relief pertaining to the removal or impeachment of Petitioners' officers and directors. In the former opinion, this Court even went so far as to spell out the proper statutory means for obtaining such relief.

The amended complaint sought no relief against the corporations --only JANNEY. This was the basis for this Court's ruling in No. 19,745 that the defendant corporations (Petitioners herein) were not to be accorded the right to answer the Amended Complaint. Petitioners, in law, were only nominal defendants. Or so they were told. Nevertheless, Respondent has, for all intents and purposes--and certainly in practical effect--treated the action as one seeking to depose and disfranchise Petitioners' officers and directors. Respondent cannot alter this fact by now taking the position that he simply doesn't know who they are and must be convinced of their credentials, "beyond all doubt" before he will recognize their authority to act for the

corporations. Such an oblique approach is just as devastating to Petitioners as Respondent's initial finding that Petitioners have no valid board of directors. It is submitted that if Respondent is able to parlay an action against the late JANNEY into an action against Petitoners' officers and directors, that a denial of the right of Petitioners to answer the Amended Complaint would, in the least, amount to a denial of due process.

Pertinent to the point of error specified herein is the following authority:

> "Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the Court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved." Sylvan Breach v. Koch, 8 Cir., 140 F.2d 852, 861. (emphasis added)

Petitioners have consistently objected to Respondent's consideration of "issues" pertaining to the legal status of their directors. They most certainly have never consented to the litigation of such "issues." And such "issues" were never asserted in any of the pleadings, nor did plaintiffs ever pray for relief against Petitioners. Respondent cannot

undertake to adjudicate a controversy of its own motion, but can do so only when presented by a party within the framework of a proper pleading. 20 Am Jur 2d Courts, §94, p. 455. It is also the "general rule that questions that are not within the issue presented by the pleadings may not be determined by the courts." 41 Am Jur Pleading, §368, p. 544. See also, Garrett v. Louisville & N. R. Co., 235 U.S. 308, 58 L. Ed 242, 35 S. Ct. 32.

In the United States Supreme Court case of United States v. Northern Pacific R. Co., 177 U.S. 435, 44 L. Ed 836, 20 S. Ct. 706, the plaintiff sought to obtain a forfeiture of defendant's property, even though such relief had not been pleaded. The Court there pronounced the general rule quoted above, and further held:

> "Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it." (20 S. Ct. at 707)

The lower court is without jurisdiction to adjudicate or consider issues and questions aliunde the pleadings. "Pleadings...are designed to raise material issues, and without such issues there is nothing for the Court or the jury to pass upon." 41 Am Jur Pleading, §393, p. 563. Based upon the above authorities, it is clear that the lower court exceeded its jurisdiction in adjudicating, attempting to adjudicate or in considering questions pertaining to the legal status of Petitioners'

officers and directors.

IV.

IN ACTING UPON PLAINTIFFS' CONTENTION THAT THE PETITIONERS WERE WITHOUT VALID OFFICERS AND DIRECTORS AND REFUSING TO RETURN PETITIONERS' PROPERTIES AND RECORDS UNTIL SAID OFFICERS AND DIRECTORS WERE JUDICIALI "BORN AGAIN," THE DISTRICT COURT PROVIDED RELIEF TO THE PLAINTIFFS WHICH WAS OUTSIDE THE SCOPE OF THE PLEADINGS, AND HENCE BEYOND THE JURISDICTION OF THE COURT.

Although no relief was being sought against Petitioners in the pleadings, Respondent accepted plaintiffs' contention that Petitioners were without valid directors and entered a finding accordingly. Respondent now asserts, as did Appellees in Nos. 19745, 19761 and 21099, that his finding is the law of the case and was "undisturbed on appeal." (See page 3 of Respondent's Brief In Opposition to Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition.) Petitioners are unable to comprehend the basis for such an assertion. Appellees, in the aforesaid appeals, contended as follows:

> "The trial court has found, and it has become the law of the case, that these corporations have no valid boards of directors, and therefore, no valid officers."
> Appellees' Reply Brief, p. 2.

In reply to the foregoing contention, this Court sought to resolve a "misapprehension" besetting Appellees and the Respondent. The opinic in Ely Valley Mines, Inc. v. Lee, supra, then proceeded to hold that

Petitoners' officers and directors have not been outlawed or removed, and that such results were not obtainable in this action. Respondent has nevertheless persisted to sustain his finding against the Petitioners Whether one describes Respondent's position as being supportive of his initial finding against the validity of Petitioners' officers and directors, or as merely refusing to return Petitioners' records and properties until they satisfy Respondent's impossible standards of proof as to the legal status of their officers and directors--the effect is identical. In both instances, Respondent refuses to recognize the authority of Petitoners' officers and directors to receive corporate records and properties. This relief is clearly responsive to the unpleaded requests of plaintiff DOLMAN and receiver CAMPINI.

Pertinent to the point here considered is the rule of law that declares a judgment invalid which is not responsive to the pleadings. Reynolds v. Stockton, 140 U.S. 254, 11 S. Ct. 773. It has also been held that "a court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Sylvan Breach v. Koch, supra. See also, Steffen v. United States, 6 Cir., 213 F.2d 266, 272; Cox v. United States, 6 Pet. (U.S.) 172, 8 L. Ed 359, 370; Real De Dolores Del Oro v. United States, 175 U.S. 71, 44 L. Ed 76, 20 S. Ct. 17.

Respondent has fashioned relief for plaintiffs which is beyond the scope of the pleadings and outside the prayer of the Amended Complaint. Such relief is beyond the jurisdiction of the lower court.

V.

IT WAS ERROR FOR THE DISTRICT COURT TO USE PETITIONERS' MOTION FOR RETURN OF CORPORATE PROPERTIES AS A VEHICLE FOR PROVIDING RELIEF ALIUNDE THE MOTION.

It is elementary that a motion constitutes an application on the part of the moving party for an order of court. 37 Am Jur Motions Rules and Orders, §3, p. 502; Perry v. United States, 90 App. D.C. 186, 195 F.2d 37. Petitioners' Motion For Return Of Corporate Properties was an application by the defendant corporations for specific relief pursuant to the mandate of this Court in Ely Valley Mines Inc. v. Lee, supra. The moving parties were the Petitioners herein. No one other than said moving parties had standing to seek relief by way of an order of court in this proceeding. Mantin v. Broadcast Music, Inc., 9 Cir., 248 F.2d 530, 531. As indicated under paragraph I, above, Respondent first denied Petitioners' motion and later withdrew his denial in order to have the parties consider a plan proposed by a stranger to the action, New York attorney Murray Sargent, who was notified of the hearing by Respondent.

Mr. Sargent's proposal called for stockholders meetings called by a committee of three, including the receiver, himself and Mr. Jack Crichton, present President of the defendant corporations, under the supervision of the lower court. (Tr. N-36: 10-16) The proposal was clearly objectionable to Petitioners for several reasons, including the fact that the JANNEY stock was to be excluded from the voting and that the receiver, whose only remaining function is to render an accounting,

was to again affirmatively assert control in Petitioners' affairs. Basically, however, the entire procedure was improper in that non-moving parties--indeed, strangers to the litigation--had taken control of Petitioners' motion and were seeking to obtain their brand of relief thereunder. Respondent readily accommodated the non-moving interlopers and effectively gave Petitioners the choice of an indefinite recess on their motion or the prospect of eventual "relief" based upon an unacceptable proposal foisted on Petitioners by strangers to the litigation.

It is respectfully submitted that Respondent erred in holding open the doors of Petitioners' motion for possible eventual relief to be granted pursuant to the requests of non-moving strangers who had no standing in the proceeding.

VI.

AFTER COMMITTING ERROR IN REQUIRING THE PARTIES TO SUBMIT BRIEFS AS TO THE VALIDITY OF PETITIONERS' OFFICERS AND DIRECTORS, THE DISTRICT COURT COMPOUNDED THE ERROR BY DISREGARDING, MISCONSTRUING OR OTHERWISE FAILING OR REFUSING TO APPLY PERTINENT NEVADA AND GENERAL CORPORATE LAW CONCERNING THE STATUS OF PETITIONERS' CORPORATE OFFICERS AND DIRECTORS.

During the hearing on Petitioners' Motion For Return Of Corporate Properties held March 12, 1968, Respondent ordered the parties to submit briefs as to the validity of Petitioners' officers and directors. (Tr. B-30: 12-25; 31: 1-19) As a result of said order, the parties filed the briefs identified as Exhibits I, J and K to this Petition. Petitioners request this Court's indulgence in allowing

Petitioners to substantially repeat herein the substance of the said Exhibit I in order to consolidate in this brief those matters pertinent to this point of specified error. It is noteworthy that in spite of the aforesaid briefs, Respondent has never entered a finding as to the applicable law. For all intents and purposes, however, he has either found the law to be supportive of his earlier finding invalidating Petitioners' officers and directors or he has chosen to disregard the law. In view of the conclusive character of both Nevada statute law and general corporate law on the subject, Petitioners can only conclude respectfully, that Respondent has elected to circumvent the applicable law. This Court, in its opinion in Pioche Mines Consolidated, Inc. v. Dolman, supra, later reaffirmed and reiterated in Ely Valley Mines, Inc. v. Lee, supra, pronounced the statutory methods for obtaining relief against wrongfully entrenched officers and directors. It was clear, as declared by this Court, that since this action was not based upon or instituted pursuant to the statutory requisites for seeking such relief, that indeed no such relief could be obtained in this action. (See 333 F.2d at 273) For the sake of reasonable brevity, and in view of this Court's familiarity with pertinent Nevada statutes cited as aforesaid by this Court, and set forth in Exhibit I to this Petition, Petitioner will not repeat them here. Suffice it to say that the statutory methods for obtaining relief against corporate officers and directors are clear, cannot be circumvented by Respondent, and that

> "there can be no recovery upon a cause of action however meritorious it may be, or

however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff...."

41 Am Jur Pleading, §382, p. 556 citing numerous cases including Reynolds v. Stockton, 140 U.S. 254, 35 L. Ed 464, 11 S. Ct. 773. So assuming, arguendo, that Respondent's position concerning the invalidity of Petitioners' officers and directors is correct, he may nevertheless not act thereupon in the instant action. It is simply not the jurisdictional prerogative of Respondent to question the legal status of Petitioners' officers and directors in this action.

Assuming, arguendo, that the instant action is a proper proceeding for relief against Petitioners' officers and directors, it is apparent that Respondent has either misconstrued, disregarded or otherwise failed or refused to apply applicable Nevada statute law as well as general corporation law. Respondent clings tenaciously to Nevada Revised Statutes (NRS) Section 78.330(2) which reads as follows

"2. At least one-fourth in number of the directors of every corporation shall be elected annually."

Respondent asserts that the above provision is mandatory and thereafter concludes that any failure to comply with its terms automatically deposes or invalidates the directors. Unfortunately, Respondent has either disregarded or failed to recognize the statutory provision which applies in instances where the annual election, as set forth in NRS 78.330(2), above, is not held. NRS 78.340 is directly pertinent and

reads as follows:

> "Failure to hold election of directors on regular day does not dissolve corporation. If the directors shall not be elected on the day designated for the purpose, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected." (emphasis added)

It is thus clearly intended under Nevada law that a corporate structure is not to collapse because of any failure to hold an annual election of directors by the stockholders. Respondent would have us believe, by referring only to NRS 78.335(3) (See Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 7) that vacancies among directors may be filled by the remaining directors only for the unexpired term and that at the expiration thereof, the director's authority ends unless he is re-elected by the stockholders. Under NRS 78.340 this is simply not so, as "every director shall continue to hold his office and discharge his duties until his successor has been elected." (emphasis added)

Petitioners do not quarrel with the requirement of NRS 78.330 (2) concerning the annual election of one-fourth of a corporations directors. It is submitted, however, that said provision is irrelevent to the instant action. Petitioners are not contesting the right of a stockholder to properly petition a court for an annual election--that

right is not at issue in this action--nor has such relief been sought. Petitioners do contend, however, that under Nevada law cited above, the failure to hold an annual election pursuant to NRS 78.330(2) will not ipso facto depose or disfranchise corporate directors. Indeed, under such circumstances, NRS 78.340 clearly imposes on the hold-over directors, a continued responsibility to discharge the duties of their office.

Petitioners' position as to the effect of NRS 78.340 on hold-over directors is fully supported by the general corporation law and case authorities. Pertinent to this prémise is the following:

> "Directors, trustees or other officers of a corporation, elected or appointed for a certain time, hold over after the expiration of their term until their successors are elected or appointed, and only the corporation itself can complain of an exercise of official functions by officers and directors whose terms have expired but whose successors have not been elected. Accordingly, with respect to tenure of office, the general rule is that the failure of a corporate body to elect officers or directors does not end the terms of those previously elected. Frequently there is an express provision to this effect in the charter of a corporation or the general law. Failure to elect

officers results in continuing the old officers in power. Thus, where the corporation fails to hold its regular annual meeting for the election of directors, the directors then in office hold over until their successors are elected." Fletcher Cyclopedia Corporations, Vol 2, Holding Over, §344, p. 135 (emphasis added); also §375, p. 266. See also, Schuckman v. Rubenstein, 6 Cir., 164 F.2d 952; Liken v. Shaffer, 64 F. Supp. 432, 450 (D.C. Iowa, 1946)

Even if it were argued that the officers and directors of the defendant corporations enjoyed only a de facto status, the law clearly prohibits a collateral attack on their authority.

"If persons are de facto officers, their title to the office cannot be impeached collaterally by third persons; their right to the offices claimed and exercised by them can only be tested in a quo warranto proceeding, or by the statutory methods provided in many states...."

"For instance, third persons dealing with de facto directors cannot collaterally show the illegality of the election of the de facto

officers, where no other persons are claiming a right to act as directors, and the incumbents are exercising the usual functions of the office. So where de facto directors move to dismiss an appeal, their title to the office cannot be attacked by the party opposing the motion." Fletcher Cyclopedia Corporations, Vol 2 §387, Collateral Attack on Directors, p. 223-225 (emphasis added)

Here, several of the directors have served and functioned as such for many years, and vacancies within their numbers have been filled by the action of the remaining members of the boards. This is strictly in accordance with Nevada law[1] providing for the filling of vacancies by a majority of remaining directors unless otherwise provided in the articles of incorporation. The articles of Ely Valley Mines, Inc., Article Seventh, expressly provides that vacancies may be filled by the directors "until their successors are elected and qualified." There is no provision in the articles of Pioche Mines Consolidated, Inc. which prohibits the directors from filling vacancies among their number, so the law of Nevada as cited in the footnote below is applicable.

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[1]The pertinent provision under NRS 78.335 reads as follows:
"2. All vacancies, including those caused by an increase in the number of directors, may be filled by a majority of the remaining directors, though less than a quorum, unless it is otherwise provided in the certificate or articles of incorporation or an amendment thereof."

It must also be emphasized strongly that there are no parties other than the presently constituted boards of directors and officers who claim the right to said positions. There are no other persons claiming to function as such. Although Petitioners do not admit -- or even hint--that their directors and officers enjoy anything less than a de jure status, it is indisputable that they would qualify as de facto directors and officers in any event.

Petitioners conclude that even if Respondent was jurisdictionally entitled to adjudicate the legal status of Petitioners' officers and directors, he has erred in his interpretation, application or disregard of the law as noted above.

CONCLUSION.

Petitioners respectfully submit that the cumulative impact of the facts, transcripts and documents now before this Court in this instant proceeding supports Petitioners' position as to the issues presented herein, and clearly indicates that Respondent will not return Petitioners' records and properties to any present officer, director or agent of the petititioning corporations unless specifically so ordered by this Court. Petitioners accordingly pray for issuance of a writ of mandamus from this Court which shall deprive Respondent of all discretion in the premises, and shall compel the District Court and the said Respondent to order the immediate return of Petitioners' records and properties to any officer, director or agent specified on the current annual list of officers, directors and resident agent required

by Nevada Revised Statutes (NRS) 78.150.

Petitioners also pray this Court for the issuance of a writ of prohibition prohibiting the District Court, and each and all of its Judges to whom the main action may be assigned, for any and all purposes, proceedings and hearings, including the Respondent, from considering, hearing or litigating any question, issue or matter pertaining to the validity or legal status of the directors and officers of the defendant corporations and enjoining plaintiffs below, the receiver AMERICO CAMPINI, and their counsel from interfering with the immediate return of the properties and records of defendant corporations and the operation and use thereof.

Dated August 23, 1968.

Respectfully submitted,

JOHNSON & STEFFEN

BY THOMAS L. STEFFEN

THOMAS L. STEFFEN
Counsel for Petitioners
112 North Third Street
Las Vegas, Nevada

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---oOo---

PIOCHE MINES CONSOLIDATED, INC., and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

CAROL M. SLAGLE, being first duly sworn, deposes and says:

That on the 26th day of August, 1968, she delivered a copy of Petitioners' Opening Brief to The Honorable ROGER T. FOLEY, at his office in the United States District Court, Federal Building, Las Vegas Boulevard South, Las Vegas, Nevada.

DATED this 26th day of August, 1968.

Carol M. Slagle

Carol M. Slagle

SUBSCRIBED AND SWORN to before me this 26th day of August, 1968.

THOMAS L. STEFFEN

Notary Public

RECEIPT OF TWO COPIES of the above and foregoing PETITIONERS' OPENING BRIEF is hereby acknowledged this _____ day of August, 1968.

SAMUEL C. SHENK

SINGLETON, DELANOY, JEMISON & REID, Chartered

BY _____
Counsel for Respondents
302 East Carson
Las Vegas, Nevada

IN THE
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Respondent.

NO. 22,700

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petitioners' Reply Brief

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Attorneys for Petitioners

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IN THE

UNITED STATES COURT OF APPEALS

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THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

Petition for Writ of Mandamus and Prohibition

PETITIONER'S REPLY BRIEF

In reply to Respondent's Brief In Opposition To Petition For A Writ of Mandamus and Prohibition, Petitioners submit the following:

I.

THE RESPONDENT COURT FURTHER ERRS IN ARROGATING TO ITSELF THE DISCRETION TO BOTH REMOVE OR REFUSE TO RECOGNIZE PETITIONERS' OFFICERS AND DIRECTORS AND TO WITHHOLD CORPORATE PROPERTIES UNTIL SATISFIED SAID OFFICERS AND DIRECTORS WILL HANDLE CORPORATE PROPERTIES IN A MANNER CONSISTENT WITH THE RESPONDENT COURT'S PREDILECTION.

Respondent characterizes the primary issue as being whether

the Respondent Court has abused its discretion in

> "refusing to return assets to each corporation until it is assured that the corporations have appropriate officers to whom the assets of the corporation may be returned and who will utilize the same for the benefit of the stockholders who are the owners of each corporation."

In calling the Court's attention to use of the conjunctive "and" in the aforesaid quote, it is clear that Respondent now takes the position that the lower court may, as a condition precedent to the return of Petitioners' records and properties, both adjudicate the validity of Petitioners' officers and directors and then require assurance that such officers and directors will utilize said properties and records in a certain manner. This is tantamount to an expropriation of corporate government and management by Respondent.

It is respectfully submitted that under the circumstances of the instant case, Respondent has abused his discretion in refusing to return Petitioners' properties and records pending an attempted adjudication of the validity of Petitioners' officers and directors and the propriety of their intentions regarding the use of Petitioners' properties and records.

II.

RESPONDENT'S DISCRETION TO FURTHER WITHHOLD THE RETURN OF PETITIONERS' RECORDS AND PROPERTIES PURSUANT TO THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. v. LEE,

385 F. 2d 188 WAS, BY HIS OWN ADMISSION, EXHAUSTED.

It is true that this Court, in its decision of Ely Valley Mines, Inc. v. Lee, supra, declared:

> "The properties and records should be surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason." (emphasis added)

Respondent's current position (as articulated by counsel for Plaintiff Helen Dolman and Receiver Americo Campini) purports to find support in the above quoted portion of this Court's opinion in the aforesaid decision. It is submitted, however, that Respondent has admitted that the only remaining impediment to the prompt return of Petitioners' properties and records is the judicial determination of proper corporate officers and directors to receive them. In the words of the Respondent:

> "The Board of Directors are authorized, and the only ones authorized to elect the officers. I want to turn this property back right now to the proper custodians and representatives of these corporations, but I don't know who they are." Tr. B-26:5-9 (emphasis added)

Respondent thus made the only obstacle to the return of the properties a determination by the lower court as to the validity of Petitioners' officers and directors -- an "issue" beyond the jurisdiction of the Respondent Court. Respondent is estopped to deny the foregoing premise.

Respondent contends that it is now within his discretion to allow the wrongfully appointed receiver to continue his six plus years of wrongful possession of Petitioners' properties and records on the basis that Petitioners have no valid officers and directors and that the "pretenders" to such offices are engaging in or intending to engage in conduct which is adverse to the stockholders. Petitioners deem it unnecessary to further burden this Court with reasons why Respondent is without discretion or jurisdiction to adjudicate or re-litigate the legal status of Petitioners' officers and directors. Petitioners merely re-assert the clarity of this Court's opinions in both Ely Valley Mines, Inc. v. Lee, supra, and Pioche Mines Consolidated, Inc. v. Dolman, 333 F. 2d 257, cert. den., 380 U.S. 956, 85 S. Ct. 1081, 13 L. ed. 2d 972. In combination, the two cases hold that Petitioners' officers and directors have not been outlawed or removed and that the case in chief (No. 311 below) is not a proper action for providing such relief.

Respondent seeks to justify his intrusion into the aforesaid area where jurisdiction is lacking by referring to extraneous attempted wrongs on the part of Petitioners officers and directors. It is to be noted first that even assuming, arguendo, that Petitioners' officers and directors were dedicated to a course of action inimical to the

interests of the stockholders, this fact alone would hardly justify Respondent's attempt to defrock said officers and directors. This premise is sustained and emphasized by the fact that prior to this Court's decision in Ely Valley Mines, Inc. v. Lee, supra, the Court was virtually inundated with the alleged wrongdoings and mismanagement of the late John Janney and in spite thereof, held that Janney had not been outlawed or removed from office and that Respondent could not withhold the immediate return of Petitioners' properties and records because of the fact that Janney was still president of each corporation.

Secondly, since Petitioners do not deem it proper or necessary to pursue such alleged and diversionary "wrongs" as the intended compromise of the one million dollar judgment against Janney -- such alleged wrongs being outside the scope of the issues before this Court -- Petitioners will primarily beg this Court's indulgence and deny that their officers or directors have taken any action or course of conduct deemed detrimental to the stockholders. If this Honorable Court desires to inquire into the matter further during oral argument, Petitioners' counsel shall be most willing to answer any questions this Court may have. Petitioners know of no rule of law or equity that will cause an automatic loss of authority or office on the part of corporate officers and directors merely because of alleged wrongdoing. Such a result would be a clear deprivation of due process. Respondent nevertheless seeks to do just that; he has attempted to use an action which has sought no relief against these petitioning corporations in

such a manner as to devitalize or defrock Petitioners' officers and directors and leave them powerless to act. Such conduct on the part of the Respondent Court is especially incredulous and astounding in respect of the Petitioner Ely Valley Mines, Inc. since it has been dismissed out of the action below. It is thus clear, from a practical and realistic standpoint, that said dismissal is a paper mirage, for the Petitioner Ely Valley Mines, Inc. remains a beleaguered defendant in No. 311 below, forced to continue a costly course of litigation in order to "walk out" of the lower court without leaving its records, properties and indeed its officers and directors, behind.

III.

PETITIONERS ARE COMPELLED TO CORRECT THE RECORD AS TO CERTAIN FALSE ASSERTIONS SET FORTH IN RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION.

Respondent would have this Court believe that:

> "the evidence presented to the Respondent Court by the petitioning corporations discloses that there were no meetings of the Board of Directors from 1954 (see Exhibit G to the petition on file herein) until a purported meeting of a Board of Directors held at the Parker House Hotel in Boston, Massachusetts on October 4, 1967, an intervening period of more than thirteen (13) years." (See p. 7 of Respondent's Brief In Opposition)

Respondent then justifies his finding as to no valid boards of directors on the above false premise as follows:

> "Based upon this disclosure and being competently aware of the manner in which these corporations were mismanaged by John Janney during his tenure of office in which he purported to operate each corporation as a sole proprietorship contrary to the best interests of the stockholders, the Respondent Court has repeatedly and does now adhere to the position that there are no proper directors of either corporation...." (See pp. 7-8 of Respondent's Brief In Opposition)
> (Emphasis added)

First, it is important to note that the assertion as to the thirteen (13) year interval between directors' meetings is patently false. Respondent erroneously cites, in support of his contention, Exhibit G to the petition on file herein. Respondent clearly intended to cite Exhibit H to the petiton on file herein, which Exhibit is entitled "Defendants' Reply Memorandum To Plaintiffs' And Receiver's Memorandum In Opposition To Motion For Return Of Corporate Properties." Attached to the aforesaid Reply Memorandum (Exhibit H) were sample minutes consisting of exhibits G through M. These sampl minutes were furnished Respondent Court in order to disprove an earlier false assertion by Plaintiffs' and Receiver's counsel to the

effect that there had "never been a meeting of the Board of Directors at one place or one time." However, in order to make it clear that said minutes did not purport to represent the total of such meetings over the periods involved, Petitioners' said Exhibit H Reply Memorandum stated as follows:

> "Attached hereto as Exhibits G, H, I, J, K, L and M are copies of a series of sample meetings of the Boards of Directors dating from 1954 to the present. These minutes do not, in any sense, represent the total of such meetings." (See p. 9 of Exhibit H to the instant Petition)

Petitioners here reassert the falsity of Respondent's position as to directors' meetings, and stand ready to prove same if this Court should so request.

Respondent's position as to the basis for "repeatedly" adhering to his position that Petitioners have no valid officers or directors is thus pinned to (1) a patently false premise as heretofore indicated; and (2) a persistent disregard of this Court's mandate as to the legal status and entitlement of the late John Janney as president of each of the petitioning corporations.

In passing, it should be noted that Respondent repeats the false assertion concerning the thirteen (13) year interval between directors' meetings on pages 10 and 20 (in the latter case the alleged interval

jumps to twenty-three (23) years) of Respondent's Brief In Opposition.

Attention is also drawn to false assertions on page 21 of Respondent's Brief In Opposition which, contrary to the evidence on record, indicates that there was never any election of directors by the stockholders and that the late John Janney refused to hold directors' meetings. In the same vein, Respondent falsely asserts, on page 23 of said Brief, that "no one of the individuals presently contending that they are directors of either corporation has been elected by the stockholders." In reply to these assertions, Petitioners shall merely refer to pages 8 and 9 of Exhibit H to the petition on file herein and note that Petitioners filed in open court a sworn affidavit of one Francis G. Shaw director and secretary of the petitioning corporations, attesting to his election as a director of Ely Valley Mines, Inc., at a stockholders' meeting. (See Tr. N-5: 14-25; 6: 1-16)

Parenthetically, Petitioners desire to re-emphasize that they disavow any endeavor to show disrespect for the lower court and specifically Respondent, the Honorable Roger T. Foley, Judge of the United States District Court for the District of Nevada. Nothing said herein is intended to show disrespect for the said Respondent.

IV.

RESPONDENT ERRS IN ASSUMING THAT A CORPORATION, UNDER NEVADA LAW, REMAINS A CORPORATE ENTITY IN SPITE OF HAVING NO OFFICERS OR DIRECTORS.

On page 9 of Respondent's Brief in Opposition, Respondent refers to Nevada's hold-over statute (NRS 78.340) previously cited by Petitioners in their Opening Brief, and then merely avoids its clear

import by stating it cannot be divorced and read independently of the other statutory provisions relating to private corporations, and concludes that:

> "The corporation remains as a corporate entity but it is apparent that there are no validly elected directors or officers to whom the assets may properly be delivered."

Under the terms of NRS 78.150 (1) an annual list of officers, directors and resident agent must be certified by a president, secretary or other corporate officer and filed with the Secretary of State along with a filing fee. If this is not done within a specified time, then under the terms of NRS 78.175 the defaulting corporation will have its charter revoked. It is to be emphasized, therefore, that if Petitioners' officers and directors had not complied with the requirements of NRS 78.150 (1), as noted above, since 1962 when Respondent first held that Petitioners had no valid directors or officers, their respective charters would have been revoked thus terminating the corporate entity. Under Nevada law, as cited above, only a corporate officer may file the required annual list, and hence, no officers, no list; and if there are no officers and no annual list, the end result becomes no corporate entity by virtue of the revocation of the corporation charter.

In conjunction with Petitioners' position under this point of reply, and to the extent allowed by this Court, Petitioners aver that never have their officers and directors assumed and maintained their respective positions by force; they have functioned consistently and

continuously to supply necessary corporate government and management. They have constantly seen that corporate properties were preserved by providing necessary assessment work and taxes in spite of a complete lack of income or productivity because of vexing litigation. They have also taken all necessary measures to preserve Petitioners' good standing as corporations in the state of Nevada. Petitioners' officers and directors have never had any other group represent or hold themselves out to be competitor officers and directors.

Petitioners deem it unnecessary to reply to Respondent's contention that Petitioners' officers and directors do not even have a colorable claim or title to office. The facts speak out to the contrary

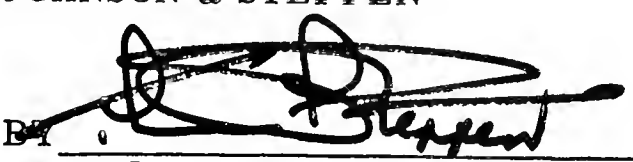
CONCLUSION

Petitioners have not sought to increase the proliferation of paper work in this proceeding by replying to each contention set forth in Respondent's Brief In Opposition. With due respect, it is earnestly asserted that none of the points raised by Respondent are of merit in the instant proceeding. Petitioners respectfully submit that the Respondent Court is no longer lawfully or equitably entitled to further defer compliance with the mandates of this Honorable Court as per Ely Valley Mines, Inc. v. Lee, supra, and Pioche Mines Consolidated, Inc. v. Dolman, supra. It is respectfully urged that the Respondent Court be allowed no further discretion in the premises, and that the writs issue from this Honorable Court as heretofore prayed.

Dated October 10, 1968.

Respectfully submitted,

JOHNSON & STEFFEN



BY _____
THOMAS L. STEFFEN
Counsel for Petitioners
112 North Third Street
Las Vegas, Nevada

RECEIPT OF TWO COPIES of the above and foregoing PETITIONERS' REPLY BRIEF is hereby acknowledged this _____ day of October, 1968.

SAMUEL C. SHENK

SINGLETON, DELANOY, JEMISON & REID, Chartered

BY _____
Counsel for Respondents
302 East Carson
Las Vegas, Nevada

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---o0o---

PIOCHE MINES CONSOLIDATED, INC., and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITES STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

TERRY V. MARSDEN, being first duly sworn, desposes and says:

That on the 10th day of October, 1968, she delivered a copy of Petitioners' Reply Brief to The Honorable ROGER T. FOLEY, at his office in the United States District Court, Federal Building, Las Vegas Boulevard South, Las Vegas, Nevada.

DATED this 10th day of October, 1968.

Terry V. Marsden

Terry V. Marsden

SUBSCRIBED AND SWORN to before me this 10th day of October, 1968.

Notary Public

Notary Public - State of Nevada
CLARK COUNTY
Charles William Johnson
My Commission Expires Sept. 2, 1972

No. 22702

United States Court Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA

Defendant and Appellee.

On appeal from the United States District Court for the District of Montana, Billings Division

---

BRIEF OF APPELLANTS

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United States Court Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA
Defendant and Appellee.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT IS INVOKED.

This action is a civil action on a claim against the United States for money damages. The claim accrued after January 1, 1945, and is a claim for injury to property by one plaintiff and personal injury by the other plaintiff claimed to have been caused by the negligent or wrongful act or ommission of an employee of the United States while acting within the scope of his employment. (Tr. Vol. I, pp. 2-5) Exclusive jurisdiction of such cases is conferred on United tStates District Courts by statute, **Title 28 U.S.C.A. Sec. 1346(b)**. This Court has appellate jurisdiction by virtue of **Title 28 U.S.C.A. Section 1291.**

STATEMENT OF THE CASE

(Note: All references are to the Transcript of the Trial, Vol. II, unless otherwise indicated.)

This case arises because of an automobile collision which occurred Monday, July 15, 1963, (7-9) about 12 o'clock noon. (63-71) The collision occurred on a highway bridge situated about 2 miles Southeast of the town of Culbertson (9) in Northeastern Montana. The highway bridge, 1121 feet in length, runs North-South across the Missouri River. It serves Montana State Highway Number 16 (Ex 10) and is the only bridge across the river for a distance of 54 miles West and 18 miles East. (78) The bridge is slightly arched, (Ex 16) 20 feet wide (Ex 10) and paved with concrete. (107) The road to the South is an asphalt road (106-107) 21 feet wide. (Ex 10) The highway runs straight South from the bridge, with a slight downward slope, (Ex 16 & 11) for a distance of about 2100 feet (Ex 10) where, after crossing a small wooden bridge, it curves so that it cannot be observed from the bridge in question. The bridge has no sidewalks; (Ex 15, 16) it was designed to be used by motor vehicles only. The traffic across the bridge was described as "pretty heavy, and other days not too heavy," (38) by Mr. Ramsbacher, the government witness who testified and as " - - intermittent.

Some days it is very heavy and some days you don't meet any traffic at all" (77) by the highway patrolman who investigated the accident.

On the day of the accident Clifford Ramsbacher, an employee of the Geological Survey (an agency of the defendant) came to the bridge in the course of his employment to collect data with respect to the flow of the river. (7-9) This employment required him to assemble what he called a "Bridge Crane". A device made of angle iron about 4 foot square (11) with a small boom, designed to reach over the bridge railing and lower testing in instruments into the river. (Ex 2) (The photos of the machine show it painted a bright orange and show Ramsbacher with bright clothing on also. The bright paint and clothing were not put on until after the accident. (22)) The bridge crane when assembled was pulled by hand. (11) In operating the machine Ramsbacher pulled it into the East or North bound traffic lane. (28) He would then lower the instruments into the water from the bridge and measure the depth of the water and its velocity. Measuring the depth of the water required him to peer over the railing at instruments which he had lowered and measuring the velocity was done by listening (on earphones) for, and counting, each "click" one of the instruments made as it revolved in the

current. (12-13) After measuring the machine would be moved to another point and the operation repeated until the river was measured. The bridge crane was usually on the bridge for 2 hours each time the river was measured and on the day of the accident it was on there for 3 hours. (13) In addition to listening to and observing his instruments, Ramsbacher usually had no assistance and was required to direct traffic around the obstruction created by the machine (13-15,27) which took 4 feet out of the 10 foot traffic lane. (11,13-14) He was aware that the machine created a bottleneck and a hazard to traffic and was dangerous to himself, also. He said that he had complained about the situation (40-41) but the procedure remained the same. (26-27)

Ramsbacher put his machine on the bridge about 11:00 a.m. Before starting to work with it he placed a sign at the North entrance to the bridge on the right hand side which said "Men Working". (18-19) This sign was either 18" or 24" square (77 yellow in color with black lettering. When in place it had one of the points up so that it was a "diamond shape". (77) Ramsbacher had one other sign of the same dimensions and wording as the first (77) to warn North bound traffic coming toward him in the East traffic lane, of the presence of the machine.

There is considerable doubt as to where and when this sign was placed. Ramsbacher said he placed the sign about 100 feet South of that part of the bridge which had overhead structure and left it there while he measured. (20-40) He told the investigating patrolman, however, that in the 15-20 minute interval between the accident and the arrival of the officer that he had moved both his machine and sign to the South and that the collision had taken place at about the then location of the sign. (73-74) When he told the patrolman this he was at work within a few feet of the warning sign. (73-74, 116-118) That the sign was either not in use or was being used upon or so close to the machine as to be worthless for warning purposes is shown by the testimony of Ethel Jimison (97) and Jerry Jimison (58-59) both of whom observed carefully and of Tony Bucciarelli (126) who was less careful, none of whom saw any warning sign. While Mr. Ramsbacher was engaged in measuring the Jimison automobile was approaching from the South on Highway 16. (48-49) This automobile was a 1957 Chevrolet (90) in good operating condition. (50) In the front seat were Jerry Jimison on the left, his mother the plaintiff, Ethel Jimison, in the middle and his grandmother on the right. Jerry's three small sisters were in the rear seat. (50-51) Jerry Jimison, two weeks short of his 17th birthday, a licensed driv-

er for 2 years (47, 48) was proceding at a speed of 60 to 65 miles per hour. 6 or 7 miles before reaching the bridge in question he passed an automobile being driven by a Tony Bucciarelli. (52) As Jerry Jimison rounded the curve 2,000 feet from the bridge (Ex 10) he saw "a speck" on it (54) which, as he approached resolved itself into a man (Ramsbacher) and his machine. (57,58) Jerry slowed and as he come to within 50 or 60 feet of the machine, stopped because Ramsbacher had put up his hand indicating "stop" (59,60) and because there were trucks approaching on the bridge from the opposite direction. (56, 57) The Jimison car was rammed from the rear as soon as it stopped by Mr. Bucciarelli's car. Jerry said there were no warning signs visible. (59) In the last several hundred feet prior to stopping he had his foot on the brake constantly. His foot was still on the brake when the collision occurred. (61, 94) Mrs. Jimison, the plaintiff, testified. She said that she too had watched the man and machine on the bridge as the car approached. (91,92) She said that after the car stopped she heard a squealing or screeching, that she started to turn to look toward the rear of the car but that the collision occurred before she could turn. (95) Both Jerry and Mrs. Jimison were watching ahead prior to the accident. Neither of them testified as to the distance Mr. Bucciarelli was following them.

Mr. Bucciarelli produced as a witness by the defendant had no independent recollection of the events leading up to the collision until his car was in a dangerous position. He remembered the Jimison car passing him (122) and doesn't remember it again until he was about to run into it.

> "Well, when I come to the bridge I seen the car and I did not realize that the car had made a dead stop, and I realized I was gaining on it rapidly, and then I realized that the car was standing still, so I tried to stop, but I did not have enough room and I hit his rear end." (124)

Bucciarelli testified that he didn't see the bridge crane until after the accident, (128) that there were no warning signs or flagmen and if there had been he would have slowed down. (127)

Ramsbacher testified that he saw both the Bucciarelli and Jimison cars as they come around the corner which is 2,100 feet South of the bridge. He said " - - they were fairly close together. That is how come I was more or less interested in them." (110) He said that they were still close together as they come upon the bridge (32), that there was no interval of time between the stopping of the Jimison automobile and the accident (36) and that the cause of the accident (in his opinion) was that "the second car was following too close and run into the back of him." (36)

No evidence was offered to show that either

Ramsbacher or the bridge crane would be visible to Bucciarelli as he followed the Jimison auto to a stop or approached it as it was stopped.

Suit was filed by the Jimisons against the United States, proceeding under the Federal Tort Claims Act, for damage to their automobile and, by Mrs. Jimison, for personal injuries. (Vol. 1, 2-5) After a trial the Court ruled that the plaintiff take nothing and the defendant recover its costs. (Vol. 1, 224-238) The decision of the trial is reported at **267 Fed. Sup. 674. A** summary of the Court's ruling is contained in its opinion at page 236 of Vol. 1.

> "Bucciarelli's testimony that he did not see the crane or Jimison car until he was on the bridge is simply incredible. In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile. Under the Montana law it was his duty to 'see what is in plain sight', and in legal effect he is in the position of having actually seen the obstruction in ample time to avoid the the collision. Under these circumstances neither Ramsbacher nor the Jimisons were obliged to foresee or anticipate that Bucciarelli would drive his automobile into the rear of the stopped Jimison car.
>
> Bucciarelli's negligence was the sole proximate cause of the accident. His actions constituted an intervening force which was a superseding cause of the accident, precluding any negligence of Ramsbacher from being a proximate cause of the

accident."

A motion for new trial and an exception to one of the Court's findings was made as follows: (Vol I, 241)

"Plaintiffs move the court to set aside its opinion and judgment rendered thereon entered herein on the 26th day of May 1967, and to grant plaintiffs a new trial on the grounds that:

1. The evidence does not support the findings of fact upon which the opinion is based.
2. The court erred in making the following finding contained on page 13 of the typewritten opinion:
   'In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile.'
3. The opinion and judgment are contrary to law in that they reduce and narrow the liability of one who negligently obstructs a public highway.
4. The opinion and judgment are contrary to law in that they relieve the defendant from liability for the forseeable consequences of its negligence."

The motion for new trial was denied, the Court saying: (Vol. 1, 268, 269)

"I agree with counsel for the plaintiff that Bucciarelli must have seen the Jimison car and that his use of the word 'see' should be construed as 'perceive' or being 'apprised'. As stated in the opinion, I find Bucciarelli's testimony incredible. The mere fact that he states that he did not see either the Jimison car or the crane until he was on the bridge

does not excuse him from seeing what was 'in plain sight'."

The Court declined to grant plaintiffs a new trial or amend the finding to which exception was taken. This appeal followed. (Vol. 1, 275)

We feel the District Court in releasing the United States from the responsibility for its negligence applied an illogical, outmoded concept which has been generally rejected and for which there is no predicate in this State. Even if the Court's theory is correct there is no evidence to support the finding critical to the application of the theory, that is, that Bucciarelli's view of the obstruction was "clear and unobstructed".

SPECIFICATION OF ERRORS

1. The Court erred in ruling that the United States was excused from responsibility for negligently obstructing a bridge on the basis that another negligent person, Bucciarelli, should have seen the obstruction in time to avoid it.

2. The Court erred in finding on page 13 of the original opinion (Vol. I p. 236) as follows:

"In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile."

The reason the finding is erroneous is because

the evidence produced did not indicate as the Court found and the evidence available militates against such finding.

ARGUMENT

THE DEFENDANT, THE UNITED STATES, WAS NEGLIGENT AND ITS NEGLIGENCE CONCURRED IN CAUSING THE INJURY AND DAMAGE FOR WHICH CLAIM IS MADE. (Relative to Specification of Error Number 1)

At the trial the negligence of the United States was not seriously denied. The Court tacitly found the United States negligent when it determined that the negligence of Bucciarelli intervened or superseded as to insulate the defendant from the consequences of its negligence.

In placing its machinery on the bridge as it did, defendant violated a Montana statute. **Sec. 32-21-101 R.C.M. (1947).**

> "(a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or highway patrolman or traffic-control device, in any of the following places: - - -
>
> 13. Upon any bridge or other elevated structure upon a highway - - - - ."

This section of the code is, by another statute, made applicable to vehicles operated by the United States. See **Sec. 32-2127 R.C.M. (1947)**

"(a) The provisions of this act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this State, or any county, city, or town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this act with reference to authorized emergency vehicles.

(b) Persons Working on Highways—Exceptions. Unless specifically made applicable, the provisions of this chapter except those contained in sections 32-2176 to 32-2183 shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work."

Violation of a state motor vehicle law designed for the safety and protection of the public constitutes negligence as a matter of law. **Faucette v. Christensen, 145 Mont. 28, 400 P.2d 883, 885, Rader v. Nicholls, 140 Mont. 459, 373 P.2d 312, Daly v. Swift & Co., 90 Mont. 52, 300 P. 265.**

If it can be said that defendant had some right to obstruct the highway then it was obliged to erect a proper warning system. Montana has adopted the Manual on Uniform Traffic Control Devices.

Faucette v. Christensen, 145 Mont. 28, 400 P. 2d 883.

This manual provides that on a two lane highway such as State Highway 16 if "heavily traveled" the warning sequence should begin 1100 feet from the point of obstruction. The first warning is a sign stat-

ing "One Lane Road Ahead". This sign is to be 48 inches by 48 inches, yellow with black lettering. Five hundred feet further down the road is to be another sign of the same size and color reading "Flagman 500 Ft.". Five hundred feet further on is to be a flagman to direct traffic. From the flagman to the point of obstruction there is to be a series of yellow traffic cones to guide one lane of traffic temporarily into the other lane. If the obstruction is on a "lightly traveled" road the manual requires a warning sequence of 850 feet commencing with a sign 30 inches square followed 750 feet later by a series of traffic cones commencing 100 feet from the point of obstruction and placed as to guide all traffic into one lane. (See manual introduced into evidence as Exhibit 20 at pp. 276, 280 and 299.) The only evidence on the point (from Government witness Ramsbacher and patrolman Marshall) was to the effect that at least part of the time the traffic on the bridge was "heavy" requiring the employment of the large signs in sequence and flagman. Even if the road is considered "lightly traveled" and even if Ramsbacher's testimony is accepted as against that of Jimisons', Bucciarelli's and the highway patrolman the sign that he placed was only about 2/3 as large as it was supposed to be and was placed about 1/3 as far from the obstruction as required. No traffic cones were used.

In view of the facts that the highway was, at

least part of the time, heavily traveled, that it was narrow, that it was substantially obstructed, that Ramsbacher's vision and hearing were necessarily preoccupied with his work, that use of warning devices was casual and half-hearted, the happening of the collision under consideration in this case was was more than forseeable, it was inevitable.

THE DECISION OF THE DISTRICT COURT EXCUSING THE DEFENDANT FROM THE CONSEQUENCES OF ITS NEGLIGENCE WAS ERRONEOUS. (Relative to Specification of Error Number 1)

In this case it was not seriously contended that the government was not negligent and the Court by implication found the government negligent. It is clear that but for this negligence the collision would not have occurred. That anyone should be granted immunity in this circumstance does not square with basic tort law precepts of responsibility for fault. There is no basis for according the government special treatment in this matter. The Tort Claims Act provides that the United States is liable " - - - under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." **28 U.S.C.A. 1346.**

The government contrary to the express direc-

tions of a statute enacted for public safety made a practice of obstructing a busy highway for several hours at a time. When this practice resulted in an accident the Court, conceding the negligence of the government, ruled that it was not responsible because Bucciarelli should have seen the obstruction in time to avoid injuring Mrs. Jimison, a third party who was completely innocent of any negligence at all.

In so ruling the District Court adopted a theory that is best described as a legal curiosity. The theory is an illogical, unfair, anachronism denounced by scholars and repudiated by nearly all courts. The theory has not been adopted in Montana and such a theory, further, is contrary to established principles of tort law in Montana. See **Harper and James, The Law of Torts, Vol. 2, Sec. 20.6 pp. 1156-1158.**

> "Another restrictive test, emphasizing chiefly the chronology of intervening human acts, holds only the last wrongdoer liable for an injury produced by the combined effect of successive acts of wrongdoing. This rule may have stemmed in part from a notion (which once had some currency) that the law fulfilled its function if it offered one legally liable defendant to a plaintiff, so that it was superfluous and in some peculiar way uneconomical to offer more. The rule may also be traceable to the reluctance of courts to admit that subsequent unlawful action may be expectable or that earlier wrongdoers should be responsible for such action. At any rate, whatever the reason, the last wrong-

doer rule has been used infrequently and capriciously to limit liability throughout the history of negligence law.

The sporadic instances of such use have probably been confined to a few situations where the law, for reasons of real or supposed policy, has disfavored a type of claim or defense which it nevertheless allows. Thus recovery has been denied in a suit against a municipality for a highway defect if the accident was also contributed to by the wrongful act of a third person. This limitation has found favor in the same class of cases in Pennsylvania also. In nearly all states the doctrine of last clear chance, a variant of the last wrongdoer rule, is employed as a limitation on the disfavored defense of plaintiff's contributory negligence. Occasionally, the defense of contributory negligence itself has been called merely an application of the last wrongdoer rule. And a harsh, indefensible doctrine has recently been fashioned by a few courts to exonerate an illegally parked vehicle from liability, even to innocent victims, wherever the moving driver saw the parked vehicle in time to avoid hitting it."

This last sentence of the above quoted section is footnoted as follows:

"Of course if the only negligence of the parked vehicle is the failure to set out proper signals, that failure is not a cause in fact of being hit by a driver who saw the obstruction anyway. Jilka v. National Mut. Cas. Co., 152 Kan. 537, 106 P.2d 665 (1940). But if the vehicle is standing on a part of the highway where it is forbidden to park, the purpose of the prohibition is surely in part to cut down the

chance of being hit by confused and stupid drivers, as well as by inattentive ones. Yet a few courts have evoked the last wrongdoer rule from the shades of the past to insulate the parked vehicle's operator or owner from liability wherever the overtaking driver saw the obstruction when he still could have stopped. Medred v. Doolittle, 220 Minn. 352, 19 N.W. 2d 788 (1945); Kline v. Myer, 325 Pa. 357, 191 Atl. 43 (1937) (perhaps no different from the Jilka case, supra, but uses broader language). Some courts have even used this kind of reasoning where the overtaking driver negligently failed to see the obstruction. Hubbard v. Murray, 173 Va. 448, 3 S.E.2d 397 (1939); Hataway v. F. Strauss & Son, 158 So. 408 (La. App. 1935); cf. Jaggers v. Southeastern G.L. Co., 34 F. Supp. 667 (M.D. Tenn. 1940). Cases where the accident would have happened anyway even if defendant's car had been left so as to leave the legal clearance are, of course, distinguishable. Schultz v. Brogan, 251 Wis. 390, 29 N.W.2d 719 (1947); Walton v. Blauert, 256 Wis. 125, 40 N.W.2d 545 (1949).

The weight of authority, however, quite properly allows the innocent victim to hold both the one who parked the stationary vehicle and the driver who negligently ran into him. Kieper v. Pacific G. & E. Co., 36 Cal. App. 362, 172 Pac. 180 (1918); cases collected in annotations, 111 A.L.R. 412 (1937), 131 id. 562, 605 (1941)."

See also **Prosser On Torts, 3rd Ed., Sec. 49 p. 285.**

"The last human wrongdoer. A similar formula, which has been stated and followed by some courts, would place the legal responsibility upon the last culpable human actor in point of time, and exempt

all those antecedent to him. This rule may have been due, at least in part, to the idea, which once had some currency, that the law fulfilled its function if it provided one legally responsible defendant, and that it was superfluous, uneconomical, and confusing to the issue to offer more. Such a rule is unworkable in two respects. The last human wrongdoer is not always responsible; he may be relieved because his negligence did not extend to the particular risk, or by reason of unforseen intervening forces over which he had no control. And the earlier actor may be held responsible if he was under an obligation to protect the plaintiff against the later wrongful conduct, as in the numerous cases where the defendant is required to anticipate and safeguard the plaintiff against the negligent, or even the criminal acts of others. Although British law still has some trouble with it, the rule is now of purely historical interest in the United States, except for odd bits and pieces of peculiar law which survive here and there, - - - "

The last sentence of the above quote is footnoted in part as follows:

"See Eldredge, Culpable Intervention as Superseding Cause, 1937, 86 U.Pa.L.Rev. 121, reprinted in Eldredge, Modern Tort Problems, 1941, 205. Also such cases as Medved v. Doolittle, 1945, 220 Minn. 352, 19 N.W.2d 788; Kline v. Moyer, 1937, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406; Hubbard v. Murray, 1939, 173 Va. 448, 3 S.E.2d 397, where one who negligently parks a car is held not liable because another driver has run into it."

THE DECISION OF THE LOWER COURT IS BASED ON A MISUNDERSTANDING OF THE CASE OF **BOEPPLE v. MOHALT.** (Relative to Specification of Error Number 1)

The District Court made its decision turn on the case of **Boepple v. Mohalt, 1936, 101 Mont. 417, 54 P.2d 857,** and relied upon it again in its decision denying the motion for new trial. The case is not in point and is not authority for the Court's decision. In this case Boepple and his wife were driving down a road and ran into a road grader operated by Mohalt. Mrs. Boepple sued Mohalt and the question before the Court was not whether or not Mr. Boepple's negligence intervened in and superseded Mohalt's negligence but whether Mohalt was negligent at all. The case was not concerned with the question of intervening or superseding negligence and is not authority in that field of law. The Court, after considering the charges of negligence against Mohalt and the evidence, ruled that the charges of negligence were not proved and Mohalt was not negligent, saying:

> "On the whole, the pictures all demonstrate clearly and beyond doubt that the alleged sharp curve and steep hill were in reality only of a slight nature; that Boepple's vision or ability to see the grader was in no way obstructed by the hill, curve, or anything else for a distance of at least 239 feet. The entire grader and its exact location on the road were clear-

ly discernible at that distance. Indeed, the pictures demonstrate that there was no obstruction which could have prevented Boepple from seeing the grader at a distance of more than 400 feet, had he been keeping a proper lookout.

The physical facts, as shown by the photographs, together with the evidence, contradict the claims of plaintiff and disclose that there was unquestionably ample room for Boepple to have passed around the grader. This circumstance, together with Boepple's own statement that his eyesight was good, and the evidence showing conclusively that he could have easily stopped or avoided the grader if he had seen it at a distance of 239 feet, lead to the inevitable conclusion that the sole, direct, and proximate cause of the accident was Boepple's failure to keep a proper lookout ahead. Clearly, there is no merit in the allegation that the grader was parked at a concealed or hidden point on a curve near the brow of a hill in such manner that Boepple could not see it until he was too close to avoid the collision. The only evidence disclosed by the record which would tend to controvert this conclusion is Boepple's testimony that he would have had to be within 119½ feet of the grader in order to determine which side of the road it was on, and that he did not see the grader in time to avoid colliding with it, and the bare assertion of Boepple and plaintiff that they were keeping a lookout ahead. - - - - -

Obviously, the sole and proximate cause of the accident here was Boepple's failure to observe and comply with the above requirements, which the law imposes on him."

The Court's ruling that Boepple's acts were the

"sole proximate cause" was not a determination of proximate causation between two negligent defendants but a determination that Boepple, alone, was negligent. At the end of its opinion the Court did say:

> "Even if it were true that defendant was negligent in these particulars, still it is manifest from what we have said already that such negligence was not the proximate cause of the accident;"

This statement is a musing or speculation by the Court on a situation not before it for decision.

> "An expression in an opinion which is not necesasry to support the decision reached by the Court is dictum or obiter dictum." **20 Am Jur 2d, Courts, Sec. 74.**
>
> "In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases."
> **20 Am Jur 2d, Courts, Sec. 190.**

The quoted dictum has never been adopted as the rule of any case in the 23 years following the rendition of the **Boepple** case. We will show in a following subdivision of this brief that Montana has never adopted the "Last Wrongdoer" theory of tort law and

has in fact long followed principles of tort law contrary to any such theory. The dictum is simply an irrelevancy which apparently was the cause of the unfortunate result obtained in this case.

The other Montana cases cited by the Court, **Fulton v. Chouteau County Farmers' Co., 1934, 98 Mont. 48, 37 P.2d 1025, and Merithew v. Hill, D. C. Mont. 1958, 167 F. Supp. 320,** are not concerned with the rights of innocent third persons as against tortfeasors whose torts concur to cause the injury and do not deal with the question of "last wrongdoer" and thus are not authority for the court's position.

THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY. (Relative to Specification of Error Number 1)

Nearly all the courts which have considered circumstances such as in the case at bar have ruled that where the negligence of two tortfeasors concurs to cause injury, the injured person, if innocent, may recover from either or both of them. The "last wrongdoer" rule has generally been repudiated when determining the responsibility of one who illegally parks upon or otherwise obstructs a public highway. There are many cases in this vein. We have not selected from or even cited most of the cases.

One of the cases is **Butts v. Ward (1938), 116 A.L. R. 1441, 227 Wis. 387, 279 N.W. 6.** In this case a truck owner appealed a judgment against him claiming that if the driver of the car which swerved actually saw the truck in time to avoid hitting it then his act was a superseding cause which would relieve the truck owner of liability. The Court ruled against the truck owner, saying:

> " - - - but to give to those cases (cited by the truck owner) or to general statements contained in their opinions the effect contended for would be to render nugatory, in most if not all situations, the statutory provision against leaving vehicles in the traveled lane of roads without the designated safeguards, and to disregard the implied statutory declaration that injury to others is reasonably to be anticipated from so leaving them.
>
> The case of Kline v. Moyer, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406, is relied on in support of the theory contended for. The facts in that case are practically the same as in the instant case. The opinion does not state that any safety statute was violated in connection with the standing truck there involved, but such was doubtless the case. Assuming that the ruling in that case supports the contention here made, we cannot follow it. Doing so would permit one driver to violate any statutory regulation without civil responsibility for collisions with another vehicle resulting from his violaton whenever the stuation was such that the driver of the latter vehicle could by the exercise of ordinary care avoid the collision. This would be contrary to our former

holdings as above pointed out. It would disregard the idea of reasonable anticipation involved in proximate causation that is implied from the enactment of statutory safety regulations. Whenever the Legislature enacts a safety statute, it declares that injury from violation of it is reasonably to be anticipated. The Legislature establishes the standard of care to be exercised and liability for injury resulting from violation of the standard follows."

The Court's reasoning, we submit, is logical and is entirely applicable to the matter being considered.

The case of **Kline v. Moyer, 111 A.L.R. 406, 325 Pa. 357, 191 A. 43,** which the Wisconsin Court declined to follow is practically identical on the facts with the **Butts v. Ward** case except that the Court ruled that if the swerving driver saw the parked truck in time to avoid the collision then this would be an intervening cause but if through negligence or inattention he failed to see the parked vehicle it would not be a superseding cause, saying:

"Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent

acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

It is uncontradicted that in the case at bar, Bucciarelli did not become aware of the obstruction until the accident was inevitable. Either the **Butts v. Ward** case or the **Kline v. Moyer** case are good authority for appelant's position.

The case of **North American Van Lines v. Brown, 8th U.S.C.A. Mo. 1957, 248 F.2d 905,** concerned a truck illegally parked upon a highway. The driver of an overtaking vehicle, a Mr. Butterfield, swerved to miss the truck and thereby caused the driver of an oncoming car to swerve and upset causing injuries. The occupant of the car which upset recovered judgment against the truck owner and he appealed claiming that his negligence was not the proximate cause of the upset. The Court upheld the judgment against the truck owner saying:

"Appellant emphasizes that there actually was sufficient room between the rear of the parked truck and the center line of the highway for Butterfield to pass safely by slowing down, driving over the reflectors and negotiating his six-foot wide automobile through the approximate seven and one-half feet remaining between the rear of the trailer and the center line of the highway. They contend that in not doing so, Butterfield was patently negligent, but want of casual connection between defendant's

negligence and plaintiff's injuries was not conclusively established and defendant's driver when he parked in the position and place that he did, should reasonably have considered the probability of injury, not only from careful drivers of other vehicles, but from negligent ones. Leek v. Dillard, supra, Mo. App., 304 S.W.2d at page 66, and cases cited therein. We do not consider the act of Butterfield so extraordinary in this situation as not to be reasonably foreseeable."

See **Jaggers v. Southeastern Greyhound Lines, 6th U. S. C. A. Tenn. 1942, 126 F.2d 762.** In this a driver negligently ran his car into the rear end of a bus which was parked in violation of statute. The question was whether the bus owner should be relieved of liability because its negligence was not the proximate cause of the accident. The Court said that the bus company was liable.

"We cannot agree, as a matter of law, that the negligence of Leftwich was the sole, proximate cause of the accident. If we assume that Leftwich was guilty of gross negligence in driving, we are still confronted with the fact that the bus was left standing upon the highway. Its presence there was a concurring, contributing factor. If it had not been there, there would have been no accident."

The case of **Northern Indiana Transit v. Burk, (1950) 17 A.L.R. 2d 572, 228 Ind. 162, 89 N.E.2d 905** is in point. In this case the suit was by a bus passenger against the bus company (its bus was negligently

parked too far from the curb) and against the driver of an automobile which collided with the bus while it was so parked. The question was whether the bus company should be discharged from a judgment because of the superseding negligence of the automobile operator. The Court held that the bus company was responsible, saying:

> "We think that it could have been found that in its general nature, what actually occurred was a probable consequence of the defendant's negligence, when all the attendant circumstances are considered, and that it was not something which was only remotely and slightly probable.'
>
> The negligence of the operator of a motor vehicle in stopping or parking his car may be a proximate cause of injury even though the negligence of the operator of another motor vehicle is an active force in contributing to the final result."

See also the following cases, all of which are in point and all of which support the rulings in the above cases. **Mason v. Crawford, 1936, 17 Cal. App. 2d 529, 62 P.2d 420; Herzog v. White, 1937, 49 Ariz. 313, 66 P.2d 253; Caylor v. B. C. Motor Transp., 1937, 191 Wash. 365, 71 P.2d 162; Tilden v. Ash, 1937, 145 Kan. 909, 67 P.2d 614; Birks v. East Side Transfer, 1952, 194 Ore. 7, 241 P.2d 120; Stafford v. Roadway Transit Co., 3rd U.S.C.A., Pa. 1948, 165 F. 2d 920; D. C. Transit System, Inc. v. Slingland, U.S. C.A., D. C. 1959, 266 F.2d 465; Northern Liquid Gas**

Co. v. Hildreth 1950, 8th U.S.C.A., Minn. 180 F.2d 330; Stafford v. Roadway Transit Co., W.D. Penn. 1947, 70 F. Supp. 555; Cronenberg v. United States, U.S.D.C., N. C., 1954, 123 F. Supp. 693 Eberhart v. Abshire, 7th U.S.C.A. Ind. 1946, 158 F.2d 24; Thomson v. Bayless, Sup. Ct. Cal. 1944, 24 Cal. 2nd 543, 150 P.2d 413. See also 7 Am Jur 2d, Automobiles, Sec. 371, 131 A.L.R. 605 and Restatment of the Law Torts 2d, Sections 439-447.

There may be an occasional case which is contrary to the foregoing authority. These cases are as **Prosser** puts it " - - - odd bits and pieces of peculiar law - - -" (supra) or as **Harper & James** say " - - - a harsh, indefensible doctrine - - -" (supra).

MONTANA PRECEDENT IS CONTRARY TO THE DISTRICT COURT'S RULING. (Relative to Specification of Error Number 1)

The District Court noted that Montana does not have any cases directly in point on the ruling it made. Montana does, however, have many cases on the question of liability for concurring negligence which show that this state has never adopted the "last wrongdoer" rule but has, to the contrary, a long tradition of placing responsibility for negligence upon all whose negligence concurred in producing the injury whether the negligence be active, passive, first or last.

In the leading Montana case of **Meisner v. City**

of Dillon, 1903, 29 Mont. 116, 74 P. 130, the action was against a city for negligence in allowing its streets to fall into disrepair. When plaintiff's horse ran away the runaway concurring with the city's negligence produced injuries. The defendant city claimed its negligence was not the proximate cause of the injuries but the Montana Supreme Court held otherwise, saying:

> "While this theory of the law (of defendant) has the support of very respectable authority, we prefer to follow the doctrine which appears to be supported by the weight of authority and the better reasoning, viz., that where two causes contribute to an injury, one of which is directly traceable to the defendant's negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence. Lundeen v. Livingston E. L. Co., 17 Mont. 32, 41 Pac. 995; Elliott on Roads and Streets, Sec. 615; Chicago & N. W. Ry. Co. v. Prescott, 59 Fed. 237, 8 C.C.A. 109, 23 L.R.A. 654; Brennan v. City of St. Louis, 92 Mo. 482, 2 S. W. 481. The question for determination in this instance was not whether defendant's negligence was the sole cause of the injury, but whether it was causa sine qua non. Hayes v. Mich. Central R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. This question, we think, was fairly submitted to the jury for determination. The doctrine here announced is very fully set forth in Union St. R. Co. v. Stone (Kan.) 37 Pac. 1012, in an action the facts of which are very similar to the facts in the case at

bar. The court in part says: 'It is urged that there is no liability on the part of the railway company or the city of Winfield for the negligent defect or obstruction of the street, as the runaway team concurred in producing the injuries of Mrs. Stone. This is the rule in Massachosetts, Maine, Wisconsin, and West Virginia, but the contrary is held by the courts of New York, Pennsylvania, Georgia, Missouri, Indiana, Connecticut, New Hampshire, Vermont, and Texas. Elliott, in his recent work on Roads and Streets, says: "According to the weight of authority, the city is liable where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver, and runs away, and comes in contact with some obstruction or defect in the road or street which the city has been negligent in not removing or repairing, if the injuries would ot have been sustained but for the obstruction or defect." * * * We prefer to follow the general weight of authority, and therefore cannot adopt the rule that cities are not liable for injuries to a runaway horse or his owner occasioned by an obstruction or defect in the streets.' "

The Montana courts have consistently ruled that if the negligence is the cause without which the injury would not have occurred (causa sine qua non) then if the defendant is responsible for the cause he is responsible in damages.

In the very early case of **Lundeen v. Livingston Electric Co.** (1895) 17 Mont. 32, 41 P. 995, the action was against a power company for negligently obstruc-

ting a public way. The plaintiff was injured when her horse shied and ran into a post, the property of defendant. The post broke and its guy wire (which was so low on its lower end as to obstruct ordinary traffic) dragged plaintiff from her horse and injured her. The question for the Court on appeal was whether or not the low placing of the guy wire was the proximate cause of the injury. The Court held for the plaintiff, saying:

> "We think it was the duty of the defendant to have placed this guy wire so high above the ground that persons could pass under it, either on foot or horseback, in the day or night time, without danger of being injured. Placed as it was, it was not only an obstruction to the free and ordinary use of the street, but it was dangerous to the safety of persons who had the right to travel the streets. We think that a reasonably prudent person must have foreseen, when stringing this wire in the street as it was strung, that just such accidents and calamities were liable to occur as happened to the plaintiff in this case."

The case of **Mize v. Rocky Mountain Bell Telephone Co., (1909) 38 Mont. 521, 100 P. 971,** considered the question of proximate cause. Some wires on a telephone company pole fell onto the wires of a power company and became energized. About nine miles away the electricity was conducted down a guy wire (which touched the telephone wire) to a fence (which

also touched the guy wire) thence along the fence to another fence for a distance of about 3/4 mile where the claimant's decedent come in contact with the fence and was killed. One of the contentions was that the guy wire touching the telephone wire constituted a superseding cause as to the power company's liability. The Court ruled otherwise, saying:

> "What intervening cause will break the chain of sequence and so far insulate the first wrongdoer's negligence from the injury as to relieve such wrongdoer? The courts have experienced some difficulty in answering this inquiry, and they are not altogether in harmony upon the subject; but to this extent they may be said to agree: That to relieve the original wrongdoer the result must be such that he could not reasonably have anticipated it. In 29 Cyc. 499, the rule is stated as follows: 'The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues.' What ought to be foreseen or anticipated as the probable consequence of the wrongdoer's negligence? In the first instance, it is not necessary to show that he ought to have anticipated the partic-

ular injury which did result; but it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. This is the meaning of section 6068, Rev. Codes, and expresses the rule announced by this court in Reino v. Montana M. L. Dev. Co., 38 Mont. ....., 99 Pac. 853. - - - - these defendants ought reasonably to have anticipated that, by their negligence in permitting this private wire to become charged with a dangerous current of electricity, serious injury would result to someone if in fact the private wire, or wire leading from it, was exposed as it might be exposed."

In the case of **McCloskey v. City of Butte, 1927, 78 Mont. 180, 253 P. 267,** the action was by a pedestrian against the city for negligently allowing a trap door to be placed in a sidewalk. As plaintiff stepped on or near the door it was opened by another person causing plaintiff to be thrown down and injured. On considering the question of proximate cause, the Court held the city to be responsible quoting with approval from another authority.

" 'It is not necessary that the cause of the injury should be the immediate, the last, or the nearest cause, in time or distance, to the consummation of the injury. It is sufficient if it be the efficient cause which set in motion the chain of circumstances leadng up to the injury and which, in natural, continuous sequence, unbroken by any new and independent cause, produced the injury. The primary cause will be the proximate cause where it is so linked and bound to the succeeding events that all create or be-

come a continuous whole, the one so operating on the others as to make the injury the result of the primary cause. * * * As a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury.' "

The case of **O'Brien v. Corra-Rock Island Mining Co., 1909, 40 Mont. 212, 105 P. 724,** was an action by a miner against his employer for injuries caused by an explosion. It appeared that the employer had caused blasting caps to be negligently stored with explosives but the actual explosion was caused by the negligence of plaintiff's fellow servant. The negligence of both the employer and fellow servant having been found, the question was whether or not the negligence of the fellow servant superseded that of the employer. The Court held not, saying:

"If the jury found that the defendant company was guilty of negligence in storing the powder where it was stored, and knew or by the exercise of ordinary care ought to have known that caps were kept with the powder, and that but for such negligence the accident would not have occurred, then, even though the negligence of a fellow servant of O'Brien caused the explosion, the defendant company would not be entitled to escape liability. Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. 130. And the same result would be reached if the cause of the explosion could not be attributed to the negligence of any one; - - "

See also **Burns v. Eminger, 1929, 84 Mont. 397, 276 P. 437; Bensley v. Miles City, 1932, 91 Mont. 561, 9 P.2d 168; Stewart v. Stone & Webster Engineering Corporation, 1911, 44 Mont. 160, 119 P. 568; Birsch v. Citizens' Electric Co., 1908, 36 Mont. 574, 93 P. 940; Frederick v. Hale, 1910, 42 Mont. 153, 112 P. 70; Smith v. Bonner, 1922, 63 Mont. 571, 208 P. 603.** These cases are all concerned with the question of defendant's negligence concurring with the negligence of another or with an act of God to produce the injury to the claimant. In deciding the question the Montana Courts have consistently taken the position that responsibility will be placed on the defendant for his negligence if the injury would not have occurred without the negligence. Applying this test to facts under consideration, the Montana Court would undoubtedly hold that the United States in obstructing the bridge so that two vehicles could not pass would have to bear the responsibility for the resulting collision. Montana law is uniformly against the idea of releasing, under the guise of proximate cause, the first wrongdoer or the passive wrongdoer.

THE MINORITY VIEW, RELIED UPON BY THE COURT, DOES NOT CLEARLY SUPPORT THE COURT UNDER THE FACTS OF THIS CASE. (Relative to Specification of Error Number 1)

The District Court relies upon cases decided in

Utah for its position that one approaching a negligently placed object on the highway is the sole proximate cause of a collision between his vehicle and the object if he could have seen it in time to avoid the collision.

Actually, Utah is in accord with the majority rule in its holdings. See **United States v. First Sec. Bank of Utah, U.S.C.A. 10th Cir. Utah, 1953, 208 F.2d 424.** In this case one Vernon, a mail truck driver, caused his mail truck to suddenly slow without a proper signal. This caused a truck operated by one Mardis which was following to come to an emergency stop. The emergency stop caused the truck to jackknife into the adjoining traffic lane and cause collision with an oncoming automobile operated by plaintiff. Suit was brought against the United States under the Tort Claims Act and the question presented to the Court of Appeals was whether or not the United States should be absolved from responsibility because Mardis' negligence was the sole proximate cause of the collision. The Court ruled against the United States, saying:

> "The remaining contention is that the trial court erred in not finding that Mardis' negligence was the sole proximate cause of the plaintiffs' injuries. The United States urges that the doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability, and that where the

original wrong only becomes injurious in consequence of the intervention of some distinctive intervening negligent act by others, the proximate cause of the injury will be imputed to the second wrongdoer. This is a correct statement of the abstract law, but to be applicable it must be shown that the intervening act would have caused the injuries independently of the original wrong. 38 AmJur., Neg. Sec. 63. Assuming that Mardis was negligent and that without such negligence the collision would not have occurred, it is equally true that without Vernon's negligence the collision would not have occurred. The collision and the injuries to the plaintiffs would not have occurred without the concurring acts of both Mardis and Vernon. The court did not make a finding as to the negligence of Mardis. It merely found that if he was negligent, his negligence was not the sole proximate cause of the injury. With this finding we agree.

The negligence of one person cannot be justified by the concurring negligence of another. Where several causes producing an injury are concurrent, and each is an efficient proximate cause without which the injury would not have occurred, the injury may be attributed to all or any of the causes. Here the two separate acts occurred at the same time and both contributed to the injuries. If the acts constituted negligence both Vernon and Mardis were responsible, and the plaintiffs could proceed against one or both of them. McKenna v. Scott, 10 Cir., 202 F.2d 23; McClave v. Moulton, 10 Cir., 123 F.2d 450. This is the rule in Utah. Charvoz v. Bonneville Irr. Dist., Utah. 235 P.2d 780; Caperon v. Tuttle, 100

Utah 476, 116 P.2d 402, 135 A.L.R. 1399; Jenkins v. Mammoth Mining Co., 24 Utah 513, 68 P. 845; Handley v. Daly Mining Co., 15 Utah 176, 49 P. 295; Annotation 131 A.L.R. 605. Caperon v. Tuttle, supra (100 Utah 476, 116 P.2d 404), was an automobile case. The court said, 'The cases are numerous which hold that if injuries result from a collision, the proximate causes of which are the concurring negligent acts of the driver and a third person, recovery may be had against either or both of such negligent persons.' It is obvious from the evidence here that the collision and the resultant injuries to the plaintiffs would not have occurred except for the acts of both Vernon and Mardis. Vernon or his employer cannot escape liability because the acts of Mardis contributed to those injuries."

The foregoing is a precise statement of the rule upon which we rely in this case. The District Court relied upon the case of **Velasquez v. Greyhound Lines, Inc., 1961, 12 Utah 2nd 379, 366 P.2d 989** (cited by the Court in its opinion pp. 233-234 of Vol. 1) This case uses the language quoted by the Court but the facts of the case are such that the same result would have been obtained under the majority rule. The facts were as follows:

"The Greyhound bus driver, by his own admission saw the Interstate truck as he approached. He said he first observed it from about three-fourths mile away and that he realized that both the truck and the Buckley car were stopped while he was still one-half mile away. If there had been flares out, or even

if the truck had been aflame, it could have given him no more information. He said he intended to stop behind the truck to render assistance and to add the benefit of his lights to the scene. As to how far the truck extended onto the highway: he testified that it appeared that there would have been room for him to go by in the same traffic lane without moving left into the center lane.

The evidence is without dispute that as the Greyhound bus approached this scene a very strange thing happened: the bus driver momentarily lost consciousness by either falling asleep or blacking out from some other cause. He was roused to consciousness just before the impact by the warning cry of a woman passenger: 'Don't hit it.' He swerved the bus to the left but not in time to avoid hitting the left rear corner of the truck. Plaintiff is one of several passengers injured in the collision."

Under the majority rule the result would have been the same because the bus driver actually saw the obstruction in adequate time to avoid the acciden; that the "very strange thing" which happened when the driver became unconscious was not a forseeable risk.

In the case of **Hillyard v. Utah By-Products Co., 1953, 1 Utah 2d 143, 263 P.2d 287,** (cited by the Court p. 234 of Vol. I) the plaintiff was riding with one who had a bottle of beer in one hand and was driving 50 miles per hour in a 25 mile per hour zone while passing other automobiles finally running his automobile into

a negligently parked truck. In a suit against the owner of the parked truck, the Court refused to excuse the truck owner from liability on the claim that the negligence of the automobile operator was the sole proximate cause of the collision. The Court, in disposing of the case, quoted the rule relied upon by this District Court, i.e., the negligence of the second actor is superseding if he should have seen the obstacle, but went on to hold that this rule didn't apply if the second actor's inattention persisted until he was in an "emergency situation". The case of **Nyman v. Cedar City, 1961, 12 Utah 2d 45, 361 P. 2d 1114,** (Cited by the Court p. 235 Vol. 1) involved a collision by an automobile with a bank of dirt left by the city in installing a curb and gutter. The collision was at night and the automobile was an unlicensed "Model T" with headlights and brakes "not up to standard", operated by a negligent, drinking driver. The Court rejected the claim of the city that the driver's negligence superseded its own and affirmed a lower court judgment against the city in favor of one of the automobile passengers. After quoting the rule relied up by the District Court, the Utah Court said it didn't apply and that rule was not relied upon.

> "But a different principle applies if the later actor (the driver Walton), even though acting negligently, did not become aware of the danger until too late to avoid striking the obstruction. After get-

ting into such an emergency situation, his action in driving into the obstruction could be regarded as acting in combination with the prior negligence of the city as a concurring proximate cause of the accident. In that event his act would not be the sole proximate cause."

The foregoing is a fairly concise statement of the majority rule. It is not authority for the District Court's position and is, in fact, directly contradictory to it.

The case of **Koff v Johnson, 1965, 1 Ariz. P.196 401 P.2d 150,** (cited by the court Vol. I, p. 235) involved a claim against a defendant who blocked one lane of an intersection in attempting to turn with her vehicle. An approaching driver in the same lane in attempting to avoid her, lost control of his vehicle and ran into a third vehicle. On a suit by the driver of the third vehicle, the trial court directed a verdict in favor of the defendant. Later the trial judge granted a new trial because the direction of a verdict, it decided, was error.This grant of new trial was appealed and the judgment was affirmed. The appellate court said that the jury could have found that the second actor negligently became confronted with "an emergency situation" in which case his negligence would not supersede that of the first actor in causing the highway to be obstructed.

The **Velasquez** case does not apply, on the facts, to this discussion. The other cases cited by the

Court in its opinion as supporting its decision do not do so. The rule relied upon by the Court is that the one obstructing the highway is cleared of responsibility if the following driver saw or **should have seen** the obstruction in time to avoid it. The cases cited by the Court do not apply this rule if the following driver through negligent inattention failed to see the obstruction in time to avoid it. This holding is particularly clear in the case of **Nyman v. Cedar City** (supra). In the case at bar it appears without contradiction that Bucciarelli through negligent inattention did not see the Jimison automobile until too late to avoid colliding with it. His view of the obstruction was also limited or lacking. Under the circumstances the Courts of Utah and Arizona, two of the very few Courts to announce the rule upon which the District Court relies, probably would rule for the plaintiffs rather than the defendant.

In its order denying motion for new trial (Vol. I, p. 273, 274) the District Court cites the case **Beesley v. United States, U.S.C.A. 10th, 1966, Okla. 364 F.2d 194,** which, on its face, supports the Court's decision. In this case a highway was obstructed by a United States vehicle which ran out of gas and a following car was forced to stop, whereupon, a second tortfeasor rearended the car which stopped. The case was decided without transcript. Since the second following ve-

hicle was found negligent for "having defective brakes" it is fair to conclude that its driver saw the other two parked vehicles in adequate time to stop but was unable to do so for lack of brakes. If this conclusion is accurate then the case is in accord with the majority of cases. The District Court says (Vol. I, p. 274) that Montana law is "substantially the same" as the Oklahoma law quoted in the opinion, as follows:

> "Where the negligence complained of only creates a condition which thereafter reacts with a subsequent, independent, unforseeable, distinct agency and produces an injury, the original negligence is the remote rather than the proximate cause thereof. This is held to be true though injury would not have occurred except for the original act."

We do not agree with the District Court in this observation. A subdivision of this brief shows what Montana law is on this general question. Conceivably, Oklahoma jurisprudence does differ from Montana's and from the overwhelming majority of other jurisdictions on this point. If it does so differ, it is antiquated and unjust.

THE COURT ERRED IN FINDING THAT BUCCIARELLI HAD A CLEAR, UNOBSTRUCTED VIEW OF BOTH JIMISON'S CAR AND THE CRANE OPERATED BY RAMSBACHER FOR AT LEAST HALF A MILE. (Relative to Specification of Error Number 2)

Specification of Error Number 2 and this portion of the argument need only be considered if the Court determines the minority view should prevail on the legal question presented.

The great majority of the cases hold that one who negligently obstructs a public highway is responsible to the injured third person if such negligence combines with the negligence of another to injure the third person. If this Court follows the majority rule then whether Bucciarelli had a clear view of the highway and the obstruction in it is irrelevant. If this Court adopts the minority view then the accuracy of the District Court's finding should be considered. Recalling the sequence of events, Ramsbacher obstructed the Northbound lane of the bridge with the crane. (11, 13-14) The Jimison automobile stopped about 60 feet away (59-60) and was rearended by Bucciarelli. (60-62) The Jimison automobile had six people in it. (50-51) There is not a shred of evidence that Bucciarelli could see through it or see the obstruction around either side of it. Buciarelli said he did not see the bridge crane until after the accident. (128) The Court ruled:

> "In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile." (Tr. Vol. I, p. 236)

Bucciarelli has no recollection of following the

Jimison automobile until immediately prior to the accident. (122, 124) Ramsbacher said he saw the automobiles come around the corner over 2100 feet away (Ex 10), that they " - - were fairly close together. That is how come I was more or less interested in them." (110) He said they were still close together as they come upon the bridge (32), that there was no interval of time between th stopping of the Jimison automobile and the collision (36) and that the cause of the collision (in his opinion) was that "the second car was following too close and run into the back of him." (36) Neither Jerry Jimison nor his mother testified as to how far the Bucciarelli automobile was following them. Both of them testified that Jerry's foot was still on the brake when the collision occurred. (61, 94) On this record plaintiffs excepted to the Court's finding which exception was not allowed, the Court saying: "It is clear from all of the testimony, which is detailed in the Court's opinion, that the Jimison car was a considerable distance ahead of the Bucciarelli car (at least a quarter of a mile) when they come around the curve." (Tr. Vol. I, pp. 267-268) All of the evidence produced is exactly to the contrary of this finding; Bucciarelli was following closely behind the Jimison automobile in which position it would be difficult or impossible for him to see over it or around to any obstruction in the highway. But even if the

finding were true, that Bucciarelli could see the Jimisons stopped in the highway for a moment before the collision and was not following closely there still is not a shred of evidence that he could see through or around the Jimison auto to the bridge crane which was in front of the auto and in the same lane of travel. Surely, since the Jimison auto was between Bucciarelli and the crane there is no basis for finding that Bucciarelli's vision was "unobstructed". The thinking of the minority of Courts who excuse the one who negligently obstructs a highway is that the obstruction is in plain view. The District Court in applying this rule to a situation where the obstruction was at least substantially obscured and probably invisible to the other tortfeasor has added a new dimension to "a harsh, indefensible doctrine." **Harper & James** (supra)

CONCLUSION

In this case the District Court conceding that the United States was negligent, and it clearly appearing that the accident would not have happened except for the United States' negligence, absolved the United States of all responsibility for damages, even though it was also conceded, there was no negligence on the part of the injured claimants on the grounds that the tortfeasor whose negligence concurred with that of the United States should have seen the negligently caused obstruction in time to avoid it. In so ruling

the District Court ignored elementary tort law to the effect that the tortfeasor is to be held responsible for injuries caused by his torts, disregarded the overwhelming weight of authority in other jurisdictions which have decided this point, ignored Montana principles of jurisprudence, which, properly applied, would have resulted in a correct decision, misapplied obiter dictum from the courts of this state and the courts of sister states, and in the role of determining proximate cause, actually applied the "last wrongdoer" rule which, according to **Prosser,** (supra) is "- - -peculiar law - - - of purely historical interest- - -", and of which **Harper & James** (supra) say is "a harsh, indefensible doctrine." Since this ruling by the District Court is purely a question of law, this Court is not bound by the "clearly errouneous" test set forth in **Rule 52 F.R. Civ. P., Republic Pictures Corp. v. Rogers, U.S.C.A. 9th Cal., 1954, 213 F.2d 662.** If the Court adopts the legal theory of the District Court the next question is whether Bucciarelli had a "clear and unobstructed" view of the highway obstruction, the bridge crane, in time to avoid it. We feel there is no evidence at all to support this finding, only some deductions drawn from sketchy, uncertain facts, and contrary to the testimony of the government's eyewitness, Ramsbacher - - - "a finding is 'clearly erroneous' when although there is evidence to support it, the

reviewing Court on the entire evidence is left with the definite and firm connection that a mistake has been made." **C.I.R. v. Duberstein, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed 2d 1218 (1960).**

The cause should be reversed and remanded to the District Court for new trial.

Respectfully submitted.

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By .....

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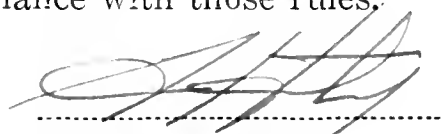
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.



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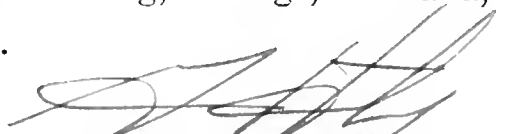
I, Gene Huntley, one of the attorneys for Plaintiffs and Appellants in the above-entitled action, hereby certify that on the 15th day of July, 1968, I served the within brief upon Clifford E. Schleusner and Moody Brickett, attorneys for Defendant and Appellee by depositing 3 copies in the United States mails, postpaid, addressed to them at U. S. Attorneys Office Federal Building, Billings, Montana, their last known address.



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APPENDIX

EXHIBIT INDEX

Number	Description	Identification page	Disposition	Page
Defendant's No. 2	Photo — bridge	103-104	Admitted	106
Defendant's No. 3	Photo — bridge	105	Admitted	106
Defendant's No. 4	Photo — bridge	105	Admitted	106
Defendant's No. 5	Photo — Bridge	105	Admitted	106
Defendant's No. 6	Photo — bridge	105	Admitted	106
Defendant's No. 7	Photo — bridge	105	Admitted	106
Defendant's No. 8	Photo — bridge	106	Admitted	106
Defendant's No. 9	Photo — bridge	106	Admitted	106
Plaintiff's No. 10	Drawing —roadway & bridge	19	Admitted	19
Plaintiff's No. 11	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 12	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 13	Photo—highway showing guard rails & bridge	23	Admitted	80
Plaintiff's No. 14	Photo—approach & bridge	20	Admitted	80
Plaintiff's No. 15	Photo — bridge	23	Admitted	80
Plaintiff's No. 16	Photo — bridge	23	Admitted	80
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Plaintiff's No. 53	Diagram of accident, officers field notes	117	Admitted	118

No. 22702

In the United States Court of Appeals

For the Ninth Circuit

ETHEL JIMISON and RAY JIMISON,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellee.

Brief of Appellee

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In the United States Court of Appeals

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ETHEL JIMISON and RAY JIMISON,
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Appeal from the United States District Court for the District of Montana, Billings Division

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BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

TABLE OF OTHER AUTHORITIES

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BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

OPINIONS BELOW

The memorandum opinion of the District Court (Judge Jameson) dated May 3, 1967, (R. 224-237)[1] is reported at 267 F. Supp. 674. Judge Jameson's memo-

randum opinion dated November 14, 1967, denying the plaintiffs' motion for a new trial (R. 266-274) is not reported.

JURISDICTION

The jurisdiction of the District Court over plaintiffs' federal tort claim was invoked under 28 U.S.C. Sec. 1346(b). Final judgment was entered on May 26, 1967, (R. 238), from which timely notice of appeal was filed on December 13, 1967, (R. 275). The jurisdiction of this court rests upon 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The appellants' statement ommitted many essential items of fact upon which Judge Jameson based his opinion. It also included many conclusions and characterizations with which the government disagrees. In the interest of brevity the appellee adopts the full text of the facts set forth in the Court's opinion (R. 224-237) filed on May 3, 1967, and the Court's order and opinion (R. 266-274)[2] filed on November 14, 1967, denying plaintiffs' motion for a new trial.

STATEMENT OF ISSUES

1. Whether the District Court's decision was in

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1 Volume I of the record, containing the pleadings, motions, orders, depositions, etc., will be referred to as "R." Volume II, which is the transcript of proceedings at the trial on December 28-29, 1966, will be designated at "Tr."

2 On a motion for a new trial in an action tried before the court without a jury the Court may amend its findings of fact and conclusions of law or make new findings and conclusions. Rule 59(a) Federal Rules of Civil Procedure; McGraw v. Simpson, 141 F.2d 789, 780.

accordance with the applicable law and supported by the evidence.

2. Whether the District Court erred in ruling that the government was excused from responsibility in negligently obstructing a bridge by reason of the fact that a second actor, Bucciarelli, after being in a position to see the hazard in time to avoid the accident, acted negligently and caused the accident.

3. Whether the District Court erred in finding that third-party Bucciarelli had a clear, unobstructed view of both the Jimison car and the government's bridge crane for at least half a mile.

SUMMARY OF ARGUMENT

Under the controlling Montana law a motorist is presumed to see that which he could see by looking and in legal effect is in the position of actually seeing a hazardous condition which is clearly visible. Under such law a negligent first actor is relieved of liability for his negligence in creating such hazardous condition if a second actor is in a position to see or become apprized of said condition in time to avoid an accident by the exercise of reasonable care but is thereafter negligent and causes such accident. In this case the second actor, Bucciarelli, was in legal effect charged with the responsibility of having seen and having been apprised of the hazardous condition on the bridge created by the first actor, the government, in time to

have avoided the accident by the exercise of reasonable care but he was shown by the evidence to have thereafter negligently caused such accident. Said subsequent negligent conduct by Bucciarelli broke the chain of causation between the government's negligence in creating the original hazardous condition and was an independent, intervening cause of said accident.

ARGUMENT

INTRODUCTION

The government is in agreement with appellants' position that the substantive law of the State of Montana is controlling with respect to the questions of negligence and proximate cause. In all of its post-trial briefs before the trial court the government assumed the position that its prior negligence in creating the hazardous condition on the bridge had been established by the evidence and confined its argument to the questions of proximate cause and intervening cause. This brief will assume the same factual position and will limit the scope of its argument to a further discussion of proximate cause and intervening cause as applied to the facts of this case.

It should first be noted that the arguments on proximate cause and intervening cause set forth in appellants' brief are substantially the same as those raised in their initial post-trial brief (R. 172-196), their reply

post-trial brief (R. 211-223), and their brief in support of their motion for a new trial (R. 245-253). It should further be noted that those arguments were very substantially answered and controverted in the government's post-trial brief (R. 256-260) and in its brief (R. 198-210) and memorandum (R. 262-265) filed in opposition to plaintiffs' motion for a new trial, and, that that said arguments were thoroughly analyzed and considered by the trial court in its opinion (R. 224-237) dated May 3, 1967, and in its order and memorandum opinion (R. 266-274) denying plaintiffs' motion for a new trial.

In view of the above situation the government will incorporate herein its arguments in the aforesaid briefs and will attempt to avoid, as much as possible, a repetition of that material and the material covered in the aforesaid opinions of the District Court.

THE MONTANA LAW ON PROXIMATE CAUSE AND INDEPENDENT INTERVENING CAUSE. (Relative to Appellants' Specification of Error No. 1.)

In Montana, a proximate cause is one "which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred." **Sztaba** v. **Great Northern Railway Co.,** 1966, 147 Mont. 185, 195, 411 P.2d 239; **Merithew** v. **Hill,** D. Mont. 1958, 167 F. Supp. 320, 327.

The above rule recognizes, in so many words, than "any new, independent cause" will break the original chain of causation. The Montana case of **Boepple v. Mohalt,** 1936, 101 Mont. 417, 54 P.2d 857, considered a factual situation somewhat similar to the instant case. There the plaintiff was injuried while riding as a passenger in an automobile owned and driven by her husband, when it collided with a road grader owned by the State of Montana and operated by one of its employees The grader was headed in an easterly direction, upon its left or north side of the road, and was brought to a stop just before the collision. Plaintiff and her husband both testified that they did not see the grader until it was too late to avoid the collision. In reversing a jury verdict judgment for the plaintiff and holding that the district court should have granted a directed verdict for the defendant, the Montana Supreme Court, in effect, held **as a matter of law** that when a second actor is in a position to see or be apprised of a hazardous condition created by a first actor in time to avoid the accident, but is thereafter negligent and causes such accident, that the second actor's negligence constitutes an independent, intervening cause which breaks the chain of causation stemming from the first actor's negligence. Such holding is even stronger in relieving a ~~second~~ FIRST actor from liability than is the instant case inasmuch as Judge Jameson arrived

at such conclusion, **not as a matter of law, but on the basis of his factual findings.** (R. 224-237, 266-274) In other words this is a case that would have been submitted to a jury if the Federal Tort Claims Act had provision for one

Boepple, at 54 P.2d 861, states:

> "Since the evidence shows conclusively that Boepple could have seen the grader at a distance of at least 239 feet if he had been looking ahead as he should have done, he cannot now be heard to say he did not see it. Under the circumstances, he is, **in legal effect, in the position of having actually seen** the grader at that distance."

The above rule has been consistently followed by the Montana Supreme Court, as indicated in **Monforton** v. **Northern Pacific Railway Co.,** (Mont. 1960) 355 P.2d 501, 510, where the court stated:

> "The dissenting opinion ignores the law in Montana that the driver of a motor vehicle must look not only straight ahead, but laterally ahead. He is presumed to see that which he could see by looking. He will not be permitted to say that he did not see what he must have seen had he looked. The duty to keep a lookout includes a duty to see that which is in plain sight. Monforton is, **in legal effect, in the position of having actually seen the passenger train, in the words of Boepple v. Mohalt. . . .**" Citing cases. (Emphasis supplied.)

Appellants argue that in Boepple the question before the court was not whether or not Mr. Boepple's negligence intervened in and superseded Mohalt's neg-

ligence but whether Mohalt was negligent at all, and therefore, that the court's holding on the question of proximate cause was mere dictum. (Appellants' Brief, P. 19) This argument ignores the following statement of the court at 54, P.2d 862:

> "Since, as we have pointed out, the proximate cause of the accident was Boepple's failure to keep a proper lookout, it follows that there is no merit or force in plaintiff's allegations of negligence with respect to defendant's failure to operate the grader upon the right side of the road and his failure to use sufficient and adequate signs and warnings. Even if it were true that defendant was negligent in these particulars, still it is manifest from what we have said already that such negligence was not the proximate cause of the accident; hence such negligence, even if proved, could avail the plaintiff nothing."

The above statement makes it very clear that the court was reversing the trial court judgment on the ground that plaintiff had failed to establish the "proximate cause" element as a matter of law and that such failure made it unnecessary for the court to consider the "negligence" element. The Appellants' argument further ignores the fact that the same rule on proximate cause was followed with approval in Monforton which cited the Boepple case as the author of the rule.

THE DECISION OF THE DISTRICT COURT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF

AUTHORITY. (Relative to Specification of Error No. 1.)

The Government would like to respond briefly to Appellants' argument that the District Court's decision is contrary to the weight of authority although it is felt that the point is moot by reason of the fact that the applicable law in Montana has been clearly and definitely established by the Boepple and Monforton cases.

In support of their argument the appellants have submitted a number of cases, without regard to the method said cases were handled by the respective courts, which appellants urge as support for the proposition that, **as a matter of law,** in order for a first actor to be relieved of liability because of the negligence of a second actor, the first actor **must actually see** the hazardous condition before the chain of causation stemming from the first actor's negligence is broken. Actually, the cases discussed by appellants' fall into three groups, as follows:

1 Those cases which hold that the negligence of the first actor is merely a condition and **not a proximate cause of the accident as a matter of law.**

2. Those cases which hold that the question of whether the negligence of the first actor is merely a condition or whether it is a proximate cause of the accident is **a question of fact for the jury (or the court).**

3. Those cases which hold that the negligence

of the first actor **is a proximate cause of the accident as a matter of law.**[3]

A variety of approaches are used by different courts to determine which classification is appropriate in a particular case. However, the principal criterion generally used to determine the appropriate classification in a given situation seems to be (1) whether the second actor **actually saw** the hazardous condition in time to avoid the accident by the exercise of reasonable care, (2) whether the second actor **was in a position to see** the hazardous condition in time to avoid it, and, (3), whether the second actor **came upon an emergency situation** where the accident could not be avoided.

The above criteria and classifications were discussed in the Government's above-mentioned briefs and also in the opinions of the trial court as was the general law quoted from Prosser, The Restatement of Torts and other authorities. The trial court recognized that the authorities are in conflict in dealing with factual situations similar to that in the instant case (R. 233) but decided that the situation before it called for the application of the Montana law enunciated in the Beopple and Monforton cases. (R. 236)

In seeking to distinguish **Beesley v. United States,**

3 No case has been cited by appellants or found by the government, under circumstances in any way comparable to the instant case, in which the court held, as a matter of law, that the negligence of the first actor was the proximate cause of the accident.

364 F.2d 194 (Appellants' Brief, P. 42) appellants' assertion that "it is fair to conclude that its driver (the second actor) saw the other two parked vehicles in time to stop but was unable to do so for lack of brakes" is completely unjustified and unfounded in the light of the trial court's finding that the truck driver was "negligent in failing to keep a proper lookout." It is true that the case was decided on appeal without a transcript as stated by appellants but the said trial court's finding clearly leaves no doubt as to the significance of the appellate court's decision in Oklahoma in situations similar to that in the instant case.

THE COURT DID NOT ERR IN FINDING THAT BUCCIARELLI HAD A CLEAR, UNOBSTRUCTED VIEW OF BOTH JIMISON'S CAR AND THE CRANE OPERATED BY RAMSBACHER FOR AT LEAST A HALF A MILE. (Relative to Specification of Error No. 2.)

The scale drawing stipulated into evidence as Appellants' Exhibit 10 (Tr. 10), plus Ramsbacher's testimony marking the location of the bridge crane (Tr. 25-26, 43) on said drawing plus Jerry Jimison's verification of said crane location (Tr. 57) indicates that it is undisputed that it was at least one-half mile from the bridge crane to the near end of the highway curve in question. Jerry Jimison testified that as he approached the bridge he saw something that "looked like a speck of something on the bridge" when he was three-fourths of a mile away. (Tr. 54) Ethel Jimison testified that

"after we had already entered the curve and in the process of going around the curve I noticed something on the bridge." (Tr. 91) Ethel Jimison further testified that "at the time I noticed I couldn't fully distinguish what it was, and as we got closer, just before entering the bridge I noticed a man and something more there, and it wasn't until after we had entered the bridge that I could see he was standing by an object and he was standing near it or beside it there on the bridge." Furthermore, plaintiffs' Exhibits 11 and 12 (Tr. 80) and defendant's Exhibits 8 and 9 (Tr. 106) indicate that the road elevation at said curve is slightly higher than the road entrance to the bridge, that it gradually declines to the bridge elevation, and that the view of the roadway across the bridge and the crane thereon is very good from all points on the highway from the middle of the curve to the bridge. From the above evidence it cannot be doubted that a driver of an automobile at a point as far away as halfway around said curve (which would be well over half a mile from the crane) would have a clear, unobstructed view of said crane and any automobile that happened to be on the road between said driver and the bridge. Appellants argue to the contrary asserting that the Jimison auto blocked Bucciarelli's view of Ramsbacher and the crane. It is submitted, initially, that the Jimison auto certainly could not have been in Bucciarelli's line of sight as he

travelled the last half of the curve (from where Ethel Jimison had noticed something on the bridge) unless said auto had been traveling abreast and to the left of the Bucciarelli automobile which was certainly not the case

Secondly, in attempting to place the cars close together as they came around the curve (Appellants' Brief, P. 45) the appellants are relying solely upon a portion of Ramsbacher's testimony which appellants impeached (Tr. 109), are misinterpreting such testimony, taking it out of context, and, are ignoring a substantial amount of pertinent, reliable evidence to the contrary. Ramsbacher, on direct examination by appellants, first testified "as they (the two cars) came onto the bridge they were fairly close together." (Tr. 32) He next testified, on direct examination by the government, that he could not recall how far the cars were apart when they came around the curve. (Tr. 108) He next admitted, on cross-examination by appellants, that he had previously on May 27, 1965, given a statement to the government wherein he had stated that "both cars were traveling about 30 miles per hour when I first observed them, which was at the approach to the bridge " (Tr. 109)

Further cross-examination by appellants went as follows:

Q. All right. As to the estimation of the speed,

or how close the Bucciarelli automobile was behind the Jimison automobile, is it your recollection now that you don't remember?"

A. "Well, it seems to me that they were fairly close together. That is how come I was more or less interested in them."

Q. **"And when they were close together that is when you tried to stop them?"** (Emphasis supplied)

A. "Yes." (Tr. 110)

On redirect examination by the government, Ramsbacher next testified that "It sticks in my mind I seen them (the cars) as they came around the corner now, which is about three-fourth of a mile." (Tr. 112) However, Ramsbacher never did give any estimate of how close together the cars were when they came around the curve.

The government submits that said testimony as a whole is to the effect that (1) As the cars came onto the bridge they were fairly close together, (2) Ramsbacher had no recollection of how far the cars were apart when they came around the curve, (3) It was when the cars were close together when Ramsbacher tried to stop them, and (4) Ramsbacher's present recollection is that he first saw the cars as they came around the curve. Ramsbacher's recollections in items (2) and (4) were somewhat impeached by appellants when they obtained his admission that he had previously on

May 27, 1965, (when his memory was much fresher) given a statement to the government that "both cars were traveling about 30 miles per hour when I first observed them, which was at the approach of the bridge."

In any event it is difficult to see how the above testimony, in and of itself, has the probative force necessary to compel the conclusion that the two cars were fairly close together (i.e. closer than ¼ mile) as they came around the curve 2100 feet from the bridge, as appellants are now urging upon this court.

Furthermore, the above argument by appellants ignores pertinent, convincing testimony by their witness, Jerry Jimison. Jerry passed Bucciarelli some 6 or 7 miles from the bridge while driving between 60 and 65 miles per hour (Tr. 53) whereas he estimated the speed of Bucciarelli's auto to be 55 mph. (Tr. 68)[4] He maintained his speed (Tr. 53) until he reached the curve when he slowed to 55 mph. (Tr. 54) After passing the curve and approaching the bridge he maintained the 55 mph rate of speed at first but upon getting closer where he could identfy the object on the bridge he applied his brakes and began gradually slowing down. (Tr. 55) When he saw that it was a man and a rectangular object he slowed to 25 to 30

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4 Bucciarelli thought that his speed was between 55 and 60 mph and that the point of passing was three to four miles before he got to the bridge. (Tr. 122) He was unable to make an estimate of Jerry's speed, denied "following on his (Jerry's) tail," and said he didn't see the Jimison car any more. (Tr. 123)

mph. (Tr. 56) He considered changing lanes of traffic and going around the man and object but decided he would not have room to do so inasmuch as two trucks were approaching from the other end of the bridge. (Tr. 56-57) He continued to slow down and brought his car to a stop about 60 feet from the crane when Ramsbacher signalled him to stop. (Tr. 59-60) Ethel Jimison estimated that Bucciarelli collided with the rear of the Jimison car 5 or 10 seconds after it had stopped (Tr. 98) while Ramsbacher estimated the time interval to be 4 or 5 seconds. (Tr. 37) Giving the appellants the benefit of the most favorable speeds and distances to support their argument that the two cars were close together when they came around the curve the Jimison car would have been traveling 60 mph, the Bucciarelli car 55 mph, and the point of passing would have been 4 miles from the bridge or 3½ miles from the curve in question. Thus the Jimison car would have travelled 3½ minutes and covered 18,480 feet (3½ miles) from the point of passing to the curve. The Bucciarelli car would have travelled only 16,940 feet in the same 3½ minutes inasmuch as it was traveling only 55/60 of the speed of the Jimison car. The Bucciarelli car would thus have been approximately 1,540 feet behind the Jimison car as it came around the curve. Jerry's testimony that he slowed down to 55 mph at the curve and continued to slow

down as he approached the bridge indicates that Bucciarelli would have begun closing the distance between his car and the Jimison car when Jerry slowed down at the curve and that the closing process would have continued to the time of the impact. Based upon Bucciarelli's testimony that he was traveling 15 to 20 mph (22.5 to 30 feet per second) (Tr. 128) at the time of impact and the above testimony that 4 to 10 seconds elapsed between the time the Jimison car stopped and the moment of impact the Bucciarelli car would still have been somewhere between 90 and 300 feet behind Jerry when the Jimison car came to a stop. The government contends that the foregoing testimony and analysis, together with Ramsbacher's testimony, clearly supports the conclusion of the trial court that "the Jimison car was a considerable distance ahead of the Bucciarelli car — at least a quarter of a mile — when they came around the curve between one-half to three-quarters of a mile south of the point of impact." (R. 266) It being thus established that the Bucciarelli car was at least a quarter of a mile behind the Jimison car as they came around the curve it follows that there was substantial evidence to support the trial court's finding "that Bucciarelli had a clear, unobstructed view of both Jimison's car and the crane operated by Ramsbacher for at least a half a mile." (R. 236)

BUCCIARELLI WAS NEGLIGENT AND SUCH NEGLIGENCE WAS AN INDEPENDENT, INTERVENING CAUSE OF THE ACCIDENT. (Relative to Specification of Error No. 1.)

Bucciarelli was negligent under the following Montana statutes:

"32-2144. Speed Restrictions—basic rule.
(a) Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater that is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of the street or highway.

"(c) The driver of every vehicle shall, consistent with the requirements of paragraph (2), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway condition."

"32-2160. Following too closely.
(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of

such vehicles and the traffic upon and the condition of the highway."

Mr. Bucciarelli, from the foregoing evidence, should have seen the orange colored crane[5] on the bridge, Mr. Ramsbacher, the trucks on the bridge, and most clearly of all, the Jimison automobile with its brake stoplights flashing which Jerry Jimison testified would have been on steadily for a distance of 800 to 900 feet prior to his coming to a stop. (Tr. 66-67) Expert testimony was introduced that the stopping distance of a 1950 Buick with good tires and brakes, traveling 55 miles per hour on well travelled concrete, would be 261 feet, including reaction time (Tr. 132-135) Bucciarelli testified that his 1950 Buick (Tr. 121) had good tires and good brakes. (Tr. 125) While the presence of the Jimison automobile in front of Bucciarelli just before the impact would have partially obscured some of the above mentioned hazards on the bridge in the last moments before the accident, the Jimison automobile itself was an obstruction which would have been very plain to see for several miles and it would not have been obstructing Bucciarelli's view of the bridge when he came around the curve or when the Jimison auto would have been below Bucciarelli's line of sight to the bridge as indi-

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5 Ramsbacher testified that the crane was a bright orange color on the date of the accident although it had been painted subsequent to the accident and before the picture in evidence as Exhibit 2 was taken. (Tr. 22)

cated in defendant's colored picture in evidence as Exhibit 8 (Tr. 106). It was not a case of Bucciarelli coming upon an emergency situation which had been concealed from view. As Bucciarelli came around the curve and approached the bridge he was charged with the responsibility of seeing the "speck on the bridge" that Jerry saw, the "something on the bridge" that Ethel saw, and the Jimison automobile he was overtaking with brake stop-lights flashing for the last 800-900 feet. He was also charged with the responsibility of being aware of the double "no passing" line which is shown on plaintiff's Exhibit 10 (chart) to run the length of the bridge and to extend continuously therefrom around the highway curve in question. Plaintiff's Exhibits 11 and 12 are photographs clearly showing said double center lines running south from the bridge. Those double lines warned Bucciarelli that it was illegal to pass the Jimison automobile until the double-lined stretch of highway had been traversed by both automobiles. Plaintiffs' Exhibit 20 (Manual on Uniform Traffic Control Devices for Streets and Highways) at 2B-7(b), page 122, states as follows:

> "Where signs or markings are in place to define a no-passing zone . . . no driver shall at any time drive on the left side of the roadway within such no-passing zone or on the left side of any permanent striping designed to mark such no-passing zone throughout its length."

Sections 2B-8 and 2B-9, in addition to said 2B-7 of said Exhibit 20, explain very clearly and completely the application of the highway markings shown in plaintiffs' Exhibits 10, 11 and 12 to the situation in question Said Exhibit 20 was adopted by the Montana Highway Commission pursuant to statute, and has the same effect and dignity as other statutes governing "rules of the road," and is to be construed in conjunction with them. **Faucette v. Christensen,** Mont. 1965, 400 P.2d 883. Bucciarelli was warned by said highway markings that he was required to stay in the right lane of traffic behind the Jimison automobile until he had travelled through the no-passing zone on said highway and that he would have to stop if the Jimison automobile stopped. He was warned by the brake lights on the Jimison automobile that it was being braked and that it might stop for at least 800-900 feet before it actually did stop which was more than abundant warning inasmuch as he could have stopped his Buick in 261 feet, including reaction time. If Bucciarelli found himself in an emergency situation in the final seconds before the collision it was a situation he had gotten himself into because of his own negligence in failing to observe or heed the aforesaid warnings and danger signals that were clearly apparent long before any emergency situation developed. Upon the basis of the foregoing analysis it is apparent that the proxi-

mate cause, and independent intervening cause of the accident was fixed upon Bucciarelli before those final seconds preceding the impact by reason of his aforesaid prior negligence after he was charged with the responsibility of having knowledge and awareness of the hazardous condition.

CONCLUSION

The District Court's factual finding that "Bucciarelli had a clear, unobstructed view of both Jimisons' car and the crane operated by Ramsbacher for at least half a mile" and was in a position to see and become apprised of the hazardous situation on the bridge in time to avoid the accident, and thereafter negligently caused said accident, was amply supported by the evidence. After making such finding of fact the court properly interpreted and applied the Montana law as enunciated in Boepple and Monforton, supra, and held that the negligence of the government's employee, Ramsbacher, merely created a condition and that Bucciarelli's negligence in colliding with the rear of the Jimison automobile after being charged with knowledge of the hazardous condition, was an independent, intervening cause of said accident which broke the chain of causation stemming from Ramsbacher's original negligence in creating said condition.

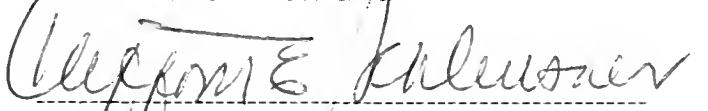
Although there is no doubt that an appellate court may reverse findings of fact by a trial court where they

are "clearly erroneous" such findings of fact are not "clearly erroneous" unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. **Fleming v. Palmer,** 123 F.2d 749, cert. den., 316 U.S. 662. Additionally, a conclusion reached by a trial court is not "clearly erroneous" even if there is evidence in the record from which different conclusions might have been reached. **Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.,** (C.A. 9, 1950), 178 F.2d 541.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully Submitted.

MOODY BRICKETT
United States Attorney for the
District of Montana



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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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I, Clifford E. Schleusner, one of the attorneys for Defendant and Appellee, in the above-entitled action, hereby certify that on the 30th day of October, 1968, I served the within brief upon Dale Cox, Attorney at Law, Hagenston Building, Glendive, Montana, and Gene Huntley, Attorney at Law, Box 897, Baker, Montana, by depositing a copy in the United States mails, postpaid, addressed to them at their last known address.

Clifford E. Schleusner

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APPENDIX

EXHIBIT INDEX

Number	Description	Identification Page (tr.)	Disposition	Page (tr.)
Defendant's No. 2	Photo — bridge	103-104	Admitted	106
Defendant's No. 3	Photo — bridge	105	Admitted	106
Defendant's No. 4	Photo — bridge	105	Admitted	106
Defendant's No. 5	Photo — bridge	105	Admitted	106
Defendant's No. 6	Photo — bridge	105	Admitted	106
Defendant's No. 7	Photo — bridge	105	Admitted	106
Defendant's No. 8	Photo — bridge	106	Admitted	106
Defendant's No. 9	Photo — bridge	106	Admitted	106
Plaintiff's No. 10	Drawing—roadway & bridge	19	Admitted	19
Plaintiff's No. 11	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 12	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 13	Photo—highway showing guard rails & bridge	23	Admitted	80
Plaintiff's No. 14	Photo—approach & bridge	20	Admitted	80
Plaintiff's No. 15	Photo — bridge	23	Admitted	80
Plaintiff's No. 16	Photo — bridge	23	Admitted	80
Plaintiff's No. 17	Photo—highway showing curve	24	Admitted	80
Plaintiff's No. 18	Photo — river & side view of bridge	24	Admitted	80
Defendant's No. 19	Copy of driver's license application	68	Ruling Reserved	138
Plaintiff's No. 20	Manual — traffic control	81	Admitted	101
Plaintiff's No. 53	Diagram of accident, officer's field notes	117	Admitted	118

No. 22702

United States Court

Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendants and Appellee.

On appeal from the United States District Court for the District of Montana, Billings Division

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

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United States Court Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendants and Appellee.

SUMMARY OF ARGUMENT

The main point raised by appellee is that this Court is limited in review of this case because of the provisions of Rule 52(a). The unanimous rule, necessarily, is that when an error of law has been made, as in this case, a finding attributed to or influenced by such error may be fully reviewed.

The rule that one is charged with seeing what is in plain sight and the question of Bucciarelli's negligence, both dwelt upon by appellee in its brief are not germane to this appeal. The question is whether or not the appellee should be held responsible for the consequences of its admitted negligence. Appellee has shown no logic, authority or precedent to sustain the District Court's ruling.

The District Court's conclusion (argued in the opening brief as specification of error Number 2) that Bucciarelli had a clear unobstructed view of the obstruction placed in the highway is likewise reviewable without reference to Rule 52(a) because the conclusion is based upon undisputed facts.

ARGUMENT

(Relative to appellants' Specification of Errors No. 1)

The main contention of appellee is that the lower court should be upheld because its finding that the government's admitted negligence was superseded, was one of fact entitled to the protection of Rule 52(a). (appellees brief pp. 7, 9, 10, 22 and 23).

Assuming, arguendo, that a finding of intervening cause is a finding of "fact", the next question is whether or not such a finding should be upheld if it is induced by an erroneous view of the law.

The lower court ruled that one who negligently obstructs a highway is excused from the consequences of his negligence if a colliding highway user saw or should have seen the obstruction in time to avoid it. This ruling was erroneous.

As a matter of logic and well settled law, a finding is not entitled to the protection of Rule 52(a) if the court in making such finding did not apply proper

legal standards. See **Moore's Federal Practice, Vol. 5. pp. 2630-2631.**

"The 'unless clearly erroneous' doctrine, discussed above, applies only to appellate review of findings of fact. It does not apply to the district court's conclusions of law. This is clear from the context of the Rule and from long established principles both at law and in equity that the appellate court is, of course, not concluded by the trial court's view of the law. The requirement in Rule 52(a) that, in addition to finding the facts, the district court shall 'state separately its conclusions of law thereon' is to furnish the casual link between the facts and the judgment rendered. But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law.

Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that that combine both fact and law, when there is error as to the law."

See also **United States v. United States Gypsum Co. (1948), 333 US 364, 68 S. Ct. 525, 92 L. Ed. 746.**

"We turn now to a different phase of the case — the correctness of the findings. The trial court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the trial court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.' The opinion indicates that in making this finding the trial court assumed arguendo that dec-

larations of one defendant were admissible against all. 67 F. Supp. at page 500. In examining the finding we follow Interstate Circuit v. United States, 306 U.S. 208, 59 S.Ct. 467, 83 L. Ed. 610, and United States v. Masonite Corp., 316 U.S. 265, 62 s Ct. 1070, 86 L.Ed. 1461, as to the quantum of proof required for the government to establish its claim that the defendants conspired to achieve certain ends. In those cases, as here, separate identical agreements were executed between one party and a number of other parties. This Court, in Interstate Circuit, concluded that proof of an express understanding that each party would sign the agreements was not a 'prerequisite to an unlawful conspiracy.' (306 U.S. 208, 59 S.Ct. 474). We held that it was sufficient if all the defendants had engaged in a concert of action within the meaning of the Sherman Act to enter into the agreements. In Masonite the trial court found that the defendants had not acted in concert and that finding was reversed by this Court. One of the things those two cases establish is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan.

In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the General Electric rule justified the arrangements or because of a misapplication of Masonite or Interstate Circuit, errors of law occurred. These we can, of course, correct. In so far as this finding

and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial, court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis supplied)

The case **of Maragakis vs. United States (CA 10th 1949) 172 F. 2d 393** is helpful. In that case suit was brought against the United States under the Tort Claims Act because a vehicle operated by a United States employee collided with a parked car occupied by plaintiffs. The trial court ruled that the govern-

ment was not negligent. The appellate Court reversed saying:

> "The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which the negligence of the Government driver is to be judged and in so doing failed to correctly appraise the facts in the light of the legal duty.
>
> Since the trial court has found the appellants non-negligent and no appeal is taken therefrom, the question of their negligence is not open here, and we have no occasion to consider their contributory negligence as a defense to the appellee's negligence.
>
> The case is reversed and remanded with directions to assess the damages and enter judgment accordingly."

In the **Maragakis** case the lower court did not set forth an erroneous conclusion of law or legal standard, as the lower court did in the case at bar. It simply made findings which the appellate court assumed must have necessarily been made without consulting consulting controlling principles. The higher court did not simply reverse but entered judgment for plaintiff and referred the case only for assessment of damages.

Another case for the proposition that findings

made under an erroneous view of the law are not protected by Rule 52(a) is **J. D. Hedin Construction Co. v. F. S. Bowen Electric Co., (DC CA 1959) 273 F.2d 511.** In that case one of the complaints made on appeal was that the lower court had applied incorrect principles in finding and awarding $30,000.00 damages. The appellate court set the judgment aside and remanded for further proceedings, saying:

> "In situations like the present, the innocent party is entitled to recover the loss of profit resulting from the breach of contract. The measure of the loss is the contract price less the costs which plaintiff would have incurred in completing his contract obligation. See, generally, M & R Contractors & Builders, Inc. v. Michael, 1958, 215 Md. 340, 138 A.2d 350. Such costs are to be estimated as nearly as may be according to 'the circumstances that existed at the time of breach.' See 5 Corbin, Contracts Sec. 1094, at 426 (1951); Carras v. Birge, Tex. Civ. App. 1948, 211 S.W.2d 998. Cf. Sternberg Dredging Co. v. Dawson, 1926, 171 Ark. 604, 285 S.W.32 We are unable to say that the trial judge followed this principle in awarding damages to the plaintiff, in fact, the indications are that he did not.

Plaintiff appellee urges that the judgment be sustained, arguing that a general verdict by a jury or by a judge sitting alone, awarding $30,000.00 to this plaintiff for the loss of a valuable contract, would have been within the bounds of reasonableness, and within the trier's prerogative of picking and choosing between bits of conflicting testimony. Be that

as it may, it is not a sufficient answer. The jury must, after all, act only on proper instructions. The judge sitting as trier of the facts must act on a sound legal and evidentiary basis; if his statements and actions indicate that he did not do so, to the serious prejudice of an appellant, correction must follow."

See also the case of **Owen v. Commercial Union Fire Ins. Co. of New York, (CA 4th 1954) 211 F.2d 488,** where the appellate court reversed a finding of fraud, saying:

"This is an appeal by plaintiff in a fire insurance case, heard by the trial judge without a jury and decided in favor of defendant on the ground that plaintiff had violated the policy provision against fraud and false swearing. The trial judge held that the burden of proof rested upon the plaintiff 'to prove, by the weight of the credible evidence, that he has not been guilty of wilfully concealing or misrepresenting any material fact or circumstance.' This was clearly erroneous. The burden of proof rested upon the defendant to establish the fraud alleged. United States Fire Ins. Co. v. Merrick, 171 Md. 476, 190 A. 335; Imperial Assur. Co. v. Joseph Supornick & Son, 8 Cir., 184 F.2d 930; Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 A. 109, Ann. Cas. 1913D, 826 and note; 29 Am. Jur. p. 1078-1079. And we think that the error is of such a nature that we should vacate the judgment and remand the case for further hearing. The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has

manifestly influenced or controlled his findings of fact, such as mistake as to the burden of proof. 3 Am. Jur. p. 472; Hall v. Hall, 41 S.C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972. While we might pass upon the facts ourselves without giving weight to the findings of the lower court in view of his error as to the burden of proof, we think it better, in view of the highly controversial character of some of the questions involved, that they be passed upon in the first instance by the court that has had the advantage of seeing and hearing the witnesses."

The following cases are all in point and are all to the effect that the 'clearly erroneous' rule set forth in Rule 52(a) does not apply if the finding was reached because of, or influenced by, an incorrect view of the controlling law. **Davis v. Parkhill-Goodloe Company (CA 5th, 1962) 302 F.2d 489; McGowan v. United States (CA 5th, 1961) 296 F.2d 252, 254; Mastercrafters Cock & Radio Co. v. Vacheron & Constantin-Lecoultre Watches, Inc. (CA 2d, 1955) 221 F. 2d 464; Continental Motors Corp. v. Continental Aviation Corp. (CA 5th, 1967) 375 F.2d 857.**

The District Court erred in selecting the law to guide it in reaching a decision which selection was decisive in the Court's finding that the United States should be absolved from its negligence. This decision is freely reviewable on appeal without regard to any

limitation contained in Rule 52(a).

The standard used by the District Court was that the United States was excused from the consequences of its negligence if driver Bucciarelli saw or should have seen the negligently placed obstruction in time to avoid it. That this standard was erroneous is abundantly demonstrated in the initial brief. Appellee has produced no authority in support of the Court's ruling.

The decision cannot be and isn't defended as logical or on the basis of precedent. Appellee cites the case of **Boepple v. Mohalt, 101 Mont. 417, 54 P.2d 857,** (appellee's brief pp. 6, 7 and 8) and says that our initial brief "ignores" certain pertinent parts of this opinion. (appellee's brief p. 8). We pointed out in our opening brief at length (appellants' brief pp. 19-22) that the **Boepple** case was not authority for the problem in this case. That case was concerned only with whether or not Mr. Mohalt was negligent, the question of intervening cause or the effect of another's negligence was not before the court. It is true the court did speculate briefly on a question not before it, "Even if it were true - - - ". However, this musing or speculation must be treated for what it is, simple **obiter dictum.** This **obiter dictum** is what appellee relied on in the court below and relies on here as the sole basis for urging that Montana has adopted an

illogical position condemned by text writers, at variance with the nearly unanimous law of other jurisdictions and contrary to Montana precedent in similar cases. The statement relied upon by appellee (appellee's brief p. 8) is not helpful at all if it is considered with reference to the question which the court was deciding.

The **Boepple** case is authority for the rule that in negligence law one is charged with seeing that which is in plain sight. That is the only reason that the **Boepple case** was relied upon in the case of **Monforton v. Northern Pacific Railway Company, 138 Mont. 191, 355 P.2d 501.** (cited in appellee's brief at pp. 7, 8 & 22). We fail to see the relevance of this rule to the issues raised by this appeal. First of all the rule does not apply if the object to be seen is in any way obscured or not such that it must have been seen by an ordinary lookout. **Morrison v. City of Butte, ... Mont....., 431 P.2d 79.** Secondly the rule does not aid the appellee in any matters germane to this appeal and is irrelevant to any matters before the court in this case.

The latter observation applies, also, to that portion of appellee's brief dealing with the negligence of Bucciarelli (appellee's brief pp. 18-22). The question is not whether Bucciarelli was negligent but whether the appellee should escape responsibility for the negli-

gence which appellee admits. See appellee's brief page 4.

> "In all of its post-trial briefs before the trial court the government assumed the position that its prior negligence in creating the hazardous condition on the bridge had been established by the evidence and confined its argument to the questions of proximate cause and intervening cause."

ARGUMENT — Relative to Appellants' Specification of Errors No. 2

We do not believe this Court will opt for the rule urged by appellee and adopted by the lower court. Only if it does so will it be necessary to consider the question of the propriety of the court's finding that Bucciarelli had " - - - a clear, unobstructed view of both the car and crane for at least half a mile." (Vol. I, p. 236). The crane was a small machine 4 foot square constructed of angle iron. (Tr. 11, Ex.2) The Jimison automobile was between it and Bucciarelli. (Tr. 59-62) To say that Bucciarelli's view was clear asd unobstructed is simply to find contrary to all the evidence. Bucciarelli could have seen the bridge crane sometime before the collision provided 1. He was far enough behind the Jimison automobile to see over it to the crane which was on a slightly higher elevation (Ex. 16 & 11) and 2. He was not so far behind that the Jimison automobile was already hiding the crane when he come to the place it would ordinarily be visible. No

evidence of this sort was offered. The only evidence on the distance between the automobiles was offered by the appellee's witness, Ramsbacher, who said they were close together for the half mile which he observed them (Tr. 32-36, 110) indicating Bucciarelli's view of the crane was probably at all times blocked by the Jimison automobile he was following. Appellee in its brief seeks to dispute the eyewitness version of its own witness, not with evidence but with some mathematical computations (appellee's brief pp. 16 & 17). Jimison said he passed Bucciarelli approximately six or seven miles before he came to the bridge after which he proceeded at a rate of 60 to 65 miles per hour (Tr. 52-53) until about ¾ of a mile from the bridge where he slowed (Tr. 54-56). Bucciarelli said he was traveling 55 to 60 miles per hour, that Jimison passed him three or four miles before he came to the bridge (Tr. 122) and that he continued to travel at 60 miles per hour until immediately before the collision (Tr. 125). The evidence is all to the effect that the automobiles were at least fairly close to one another. The mathematical computations based on estimates are of no value at all.

The evidence as to whether Bucciarelli had a clear and unobstructed view of the crane is undisputed. The rule followed in such a case is set forth in **Stevenot v. Norberg (CA 9th, 1954) 210 F.2d 615.**

"Appellees argue that, whether or not they had enforceable contract rights to continued employment, the District Court, in the exercise of its supervisory power over its Trustee, properly ordered their reinstatement. In this connection, they remind us the Court found, in its final order, that restoration of appellees to their jobs would have no adverse or harmful effect upon the proper administration and preservation of Debtor's business and estate; but, 'on the contrary, such reinstatement, with restitution of earnings lost by petitioners (appellees) by reason of said wrongful lay-off and discharge, will be for the best interests of the Debtor Company.' Appellees argue that we are bound by the foregoing findings, since the record does not show that they are clearly erroneous. We do not think so. When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

See also **Brown v. Cowden Livestock Co., (CA 9th, 1951) 187 F.2d 1015.**

"In our opinion, whether these July 16th transactions amounted to approval of the act of Adams in collecting the purchase price or whether they created a virgin agreement between appellee and Adams, the legal result was the abondonment of the claim, if any, of appellee against appellants and the substitution or creation of a liability from Adams to appellee. This conclusion is required upon a record which shows that there is no dispute as to what

happened in the July 16th transactions. The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn."

The following cases are helpful on this point, also. **Weible v. United States (CA 9th, 1957) 244 F.2d 158, Kippen v. American Automatic Typewriter Company, (CA 9th, 1963) 324 F.2d 742, 745, Fleischmann Distilling Corp. v. Maier Brewing Company, (CA 9th, 1963) 314 F.2d 149, Lundgren v. Freeman (CA 9th, 1962) 307 F.2d 104.**

CONCLUSION

Mr. Jimison's car was damaged and Mrs. Jimison was injured by the admitted negligence of the appellee through no fault or action of their own. Excusing the government from the consequences of its negligence is unfair to the Jimisons and contrary to the basic tort law idea of responsibility for wrong. Such an awkward result can be accepted only if there is some overriding purpose to be served or the decision is supported by an unassailable body of precedent, neith-

er of which situations obtain in this case.

It is respectfully urged the cause should be reversed and remanded for a new trial.

Respectfully submitted.

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By .....
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

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I, Gene Huntley, one of the attorneys for Plaintiffs and Appellants in the above-entitled action, hereby certify that on the ...14... day of February, 1969, I served the within brief upon Clifford E. Schleusner and Moody Brickett, attorneys for Defendant and Appellee by depositing three copies in the United States mails, postpaid, addressed to them at the U. S. Attorneys Office, Federal Building, Billings, Montana, their last known address.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE RAYMOND CORTEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,103

On Appeal From the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

RUBIN SALTER JR
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE RAYMOND CORTEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,703

On Appeal From the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.
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II.
ISSUES OF THE CASE

Under statute 21 U.S.C. §174 providing that unexplained possession of narcotic drugs shall be sufficient to sustain a conviction for concealment of illegally imported drugs, possession may be actual or constructive and it need not be exclusive, but may be joint. The jury was properly instructed as to the law on "possession," common scheme and the inferences that may be drawn from 21 U.S.C. §174.

There was a proper denial of the motion for a mistrial based upon the prosecution's use of co-defendant Young's statement. There was ample evidence independent of co-defendant Young's statement to convict Cortez. Co-defendant Young's statement was voluntary.

III.
JURISDICTIONAL STATEMENT OF FACTS

The Government accepts the Appellant's Jurisdictional Statement of Facts with the following additions. On November 8, 1967, an Indictment was filed in the United States District Court for the District of Arizona, charging Joe Raymond Cortez, Anthony Lewis and Sandra Young with receiving, concealing and facilitating the transportation of 29.7 grams of Heroin in violation of 21 U.S.C. §174. The defendant filed Notice of Appeal from Judgment and Commitment, entered on January 8, 1968.

Jurisdiction in the District Court rested on 18 U.S.C. §3231, and rests in this Court on 28 U.S.C. §1291 and §1294.

The Reporter's Transcript of Testimony at trial will be referred to as "RT," and the number following "RT" will refer to the page, and the number following "L" will refer

to the line of the page. Appellant Cortez will be referred to as Defendant or Cortez. The other persons named in the Indictment will be referred to as passengers or by their respective names.

Defendant Anthony Lewis was not tried at the same time Cortez and Young were. Defendant Young has not appealed from the Judgment and Commitment.

Statement of Facts

At approximately 12:10 a.m. on the 19th of October, Joe Raymond Cortez, Sandra Young and Anthony Lewis entered the United States from Mexico in a 1959 Cadillac, with Cortez driving, at the Port of Entry, Nogales, Arizona (RT 26-27). Each of the occupants made a negative declaration as to any merchandise they may have been bringing from Mexico. Customs Port Investigator Marron had a call placed to customs officers for surveillance of the Cadillac. Customs Agent Hugh Marshall responded and observed the car at the Port of Entry (RT 124). After taking a rather circuitous route through the city of Nogales, Arizona, the 1959 Cadillac with Defendant Cortez driving, finally headed north on U.S. Highway 89 where it was stopped by customs agents (RT 131). At approximately 2:00 a.m. the defendants were stopped at Mile Post 6 and their vehicle was searched with negative results. The three defendants were returned to the customs office and a personal search was also negative. They were released and left the office at approximately 3:00 a.m.

At 3:15 a.m., Highway Patrolman Gordon F. Hopke stopped the defendants northbound on U.S. Highway 89 at Mile Post 26.4, and issued defendant Cortez a speeding citation (RT 32), then observed the defendants to leave northbound. A short time later, Hopke saw the defendant's vehicle southbound, and followed them to the location where he

had previously stopped them, and observed Cortez stop and begin walking the road shoulder, apparently looking for something. Patrolman Hopke stopped, and was advised by defendant Cortez that he was having battery trouble. The defendants left, driving south, but again they were observed to return to the area driving slowly.

Hopke advised Customs Agent Dennis of the situation, and met Dennis at 4:45 a.m. to show him the location where the defendants appeared to be searching. Customs Agent Dennis with Customs Agent Marshall at 5:25 a.m. searched the road shoulder location. At Mile Post 26.4 customs agents found a contraceptive containing Heroin, lying about a foot to the left of U.S. Highway 89 (RT 77). A surveillance was maintained at the area and at approximately 8:00 a.m. the defendant's vehicle was observed to approach the area from the south and stop fifty feet north of Mile Post 26.4. Cortez was driving and Lewis was in the back seat, with the right door open, looking down at the road shoulder (RT 79-80). Lewis instructed Cortez to back up. Cortez backed up approximately 100 feet, stopped the car, and got out and started looking under some nearby mesquite trees (RT 83). The defendant Lewis walked to the Heroin and picked it up and began walking toward the vehicle (RT 84). At this time all three defendants were arrested. The trial proceeded against Appellant Cortez and defendant Sandra Young, who is not a party to this appeal.

IV.
SUMMARY OF ARGUMENT

1. The Court did not commit plain error in instructing the jury.

2. The Court did not err in denying Defendant's motion for a mistrial based on the statement of a co-defendant.

3. Defendant Young's statements were volunteered and not the product of any interrogation by a Government officer.

V.
ARGUMENT

1. The Court did not commit plain error in instructing the jury.

Based upon the state of the evidence, the Court properly instructed the jury upon the presumption provided for by 21 U.S.C. §174, as well as to the effect of the acts of one who is a member of a common plan (RT 280 and RT 278-279). Joint possession can be shown by evidence of a joint venture, friendship, and general conduct. *Eason vs. United States* (9th Cir., 1960) 281 F.2d 818. Possession can be established by circumstantial evidence. *Covarrubias vs. United States* (9th Cir., 1959) 272 F.2d 352. Actions of each defendant were admissible against other defendant even though indictment did not charge defendant with conspiracy, aiding and abetting, nor concerted action. *United States vs. Messina* (2nd Cir., 1968) 388 F.2d 393.

In *Jefferson vs. United States* (9th Cir., 1965), 340 F.2d 193, at page 196, quoting earlier Circuit opinions this Court said:

> "'We early held that "possession" of narcotic drugs sufficient to support the inference of guilt under the statute meant "having [the narcotic drugs] in one's control or under one's dominion." Mullaney v. United States, 82 F.2d 638, 642 (9th Cir., 1936), and we have recently re-examined and re-affirmed this basic position. Rodella v. United States, 286 F.2d 306 (9th Cir., 1960), cert. denied 365 U.S. 889, 81 S.Ct. 1042, 6 L.Ed.2d 199. As the Rodella opinion and the authorities which it cites amply demonstrate, it follows from this definition of "possession" in Section 174 that so long as the evidence

establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of third persons—"possession" as used in this statute includes both actual and constructive possession. The power to control an object may be shared with others, and hence "possession" for the purposes of Section 174 need not be exclusive, but may be joint. Moreover, like other facts relevant to guilt, "possession," actual or constructive, may be proven by circumstantial evidence. We have not hestitated to uphold convictions under Section 174 wherever either actual or constructive possession by the defendant could be honestly, fairly and conscientiously inferred. This interpretation of the statute, equating the term "possession" with dominion and control, and permitting proof of dominion and control by circumstantial evidence, has been adopted in other circuits as well.' (Footnotes omitted.)"

This Court as recently as July 22, 1968, had an occasion to consider the presumption set forth in Title 21 U.S.C. §174 and decided that the statutory presumption does not amount to a deprivation of constitutional rights. *Sanchez vs. United States.* Cause #22,584 (July 22, 1968, 9th Cir.). For these reasons the Government asserts that it was not plain error to give this instruction.

2. The Court did not err in denying Defendant's motion for a mistrial based on the statement of a co-defendant.

The Government feels that in actuality the Appellant is raising the issue whether the conviction of a defendant at a joint trial should be set aside where a co-defendant's incriminating statements inculpated the Appellant. In the case at bar neither Cortez or co-defendant Young took the stand at the trial. The Supreme Court last considered this point in *Bruton vs. Supreme Court of the United States.* No. 705, October Term, 1967 (May 20, 1968).

Agent Rollin B. Klink who rode back to Nogales, Arizona, with defendant Young, after she had been advised of her constitutional rights, testified that:

> ". . . I said: 'We have been watching you since early this morning.' To which she replied: 'I told them something was going to go wrong, I just had that feeling.'" (RT 184).

The trial court admonished the jury that, "It will not be considered so far as the defendant Cortez is concerned and you will eliminate it from your consideration." (RT 184, L 9-11) This limiting instruction was proper under *Delli Paoli vs. United States,* 352 U.S. 232. The Government is aware that *Bruton* was made retroactive by *Roberts vs. Russell,* 36 L.W. 4447 (June 10, 1968).

The Government believes that the issue at bar can be distinguished from a *Bruton,* supra, situation on the facts for the following reason.

The extrajudicial statement does not refer to the non-declaration in a direct incriminating fashion. There was ample independent evidence as to the actions and conduct of Appellant Cortez from which the jury could have based its decision upon in arriving at a verdict. The use of the personal pronoun "them" didn't really add anything to the evidence against the non-declarant Cortez. Finally, the conviction is not dependent upon the statement of Miss Young.

The Court in *Bruton* emphasized that in many "cases a jury can and will follow the trial judge's instructions to disregard" inadmissible evidence as to a particular defendant (Slip opinion 12-13). The court found only that the risk that the jury would not do so is too great to take "where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury." (Slip opinion 13). There is not even a claim that the Government deliberately caused

a very ambiguous at most statement of a co-defendant to be spread before the jury. Where the statement does not directly incriminate the co-defendant, the dangers found in *Bruton* are much less great and should not vitiate the conviction. It necessarily follows that if the statement did not incriminate Appellant there was no need for a mistrial. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak vs. United States*, 344 U.S. 604, 619.

3. Defendant Young's statements were volunteered and not the product of any interrogation by a Government officer.

Customs Agent Dennis in a hearing outside the presence of the jury testified that he advised the defendants as to their constitutional rights as interpreted by *Miranda vs. Arizona*, 384 U.S. 436 (RT 170-173), The Court found that from the instructions given her by Agent Dennis, Co-defendant Young did understand her rights and, further, any statements she made were voluntary since there was no interrogation (RT 181, L 6-23). Volunteered statements of a defendant are admissible after he had been given the full warning required by *Miranda*. *Deck vs. United States*, 395 F.2d 89 (9th Cir., 1968).

VI.
CONCLUSION

It is respectfully submitted that the jury was properly instructed as to possession of a narcotic by a defendant and the presumptions that are permissible under 21 U.S.C. §174. There is enough circumstantial evidence of Appellant Cortez's possession to say that to give the instruction objected to is not plain error. The statement of the co-defendant Young as to the non-declarant Appellant, did not directly incriminate him, thus requiring the conviction to be set aside. If this be

so, there was no grounds for a mistrial and the Court did not abuse its discretion. Any statements made by co-defendant Young were not the product of any interrogation but were voluntary.

Respectfully submitted,

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